

THE PREDICAMENT
of
MODERN POLITICS

Edited by

HAROLD J. SPAETH

Associate Professor of Political Science

©1964, by the

UNIVERSITY OF DETROIT PRESS

CONTENTS

Foreword	ii
Modern Man and the Denial of	
Moral Politics	<i>Charles E. Schutz</i> 1
<i>Discussion of Modern Man and the</i>	
Denial of Moral Politics	3
The Crisis of Our Time	<i>Leo Strauss</i> 4
Jurisprudence Today; Naturalism	
Versus Positivism	<i>Anton Donoso</i> 5
<i>Discussion of Jurisprudence Today:</i>	
Naturalism Versus Positivism	8
The Crisis of Political Philosophy	<i>Leo Strauss</i> 9

2092087

PARTICIPANTS

Lecturers:

LEO STRAUSS, the leading exponent of classical political philosophy, is a Distinguished Service Professor of Political Science at the University of Chicago.

CHARLES E. SCHUTZ teaches political theory at Wayne State University and is Director of the Michigan Center for Education in Politics.

ANTON DONOSO, a member of the philosophy department at the University of Detroit, is a specialist in the history and philosophy of law.

Discussants:

RUSSELL KIRK, a widely known author and lecturer, is Research Professor of Politics at C. W. Post College, Long Island University.

CARL MERSCHEL, who teaches in the science of society and non-Western civilization programs at Monteith College, is also an internationally recognized sculptor.

JULIUS PAUL, professor of political science at Wayne State University, is widely published in the area of legal philosophy.

EDWIN H. RUTKOWSKI is chairman of the political science department at the University of Detroit.

PETER J. STANLIS, professor of English at the University of Detroit, is a well-known author and lecturer on the political philosophy of Edmund Burke.

CHARLOTTE ZIMMERMAN is a professor of anthropology and social thought at the University of Detroit.

The Editor:

HAROLD J. SPAETH, on leave from the University of Detroit, is currently a visiting associate professor of political science at Michigan State University.

FOREWORD

The subject of this publication focuses upon three fundamental matters facing political man: the denial of the relevance of moral considerations in politics; the confusion within the field of jurisprudence; and the denigration, if not the outright denial, of the significance of political philosophy to the solution of present-day political problems.

The contributors to this publication largely speak from "traditionalist" perspectives, in the vein of the great traditional theories of past political thought. As such, the lecturers and discussants engage in a critical assessment of "behavioralism," in the sense of a positivistic or non-ethical approach to the study of political phenomena. No attempt has been made to present a balanced picture of the respective benefits and shortcomings of either the traditional or the behavioral approaches.

The lectures and discussions contained herein are an edited version of material originally presented at the third annual University of Detroit Convocation, March 28-29, 1963.

It is necessary to note that this publication is vitally dependent upon the assistance of several persons and institutions: Miss Winifred M. McCarthy, who transcribed the lectures and discussions from tape to type with rare intelligence and insight; Rev. J. V. McGlynn, S.J., Dean of the University of Detroit Graduate School, for his continuous encouragement and support; the University of Virginia and the Rand McNally and Co., for permission to reprint portions of Professor Strauss' lectures; and the Relm Foundation, for its generous financial assistance. The cover design is by Carl Merschel.

HAROLD J. SPAETH

East Lansing, Michigan

December 5, 1963

Modern Man and the Denial of Moral Politics

CHARLES E. SCHUTZ

The Gallup Poll in 1944 asked the question: "If you have a son, would you like to see him go into politics as a life work when he gets out of school?" Thirty percent of the sample replied, "Yes," and 70 percent, "No." Those who said that they would like to see their sons enter politics were then asked to give reasons for their reply. The largest group, 22 percent, said, "Need clean-minded men in politics to supplant crooks in there now; need higher type; need men of character and education." Thirty percent of those who answered in the negative thought, "Politics are too crooked, unethical, corrupt, rotten . . . no honest politicians." Lastly, 16 percent of those in the negative thought, "Temptations and influences too great; even good men become crooked; would be led astray by bad influences; many politicians are corrupted."¹

Again, a survey made in Wayne County, Michigan disclosed that more than half the adults there thought that "politics was dirty or dishonest. Forty-three percent of the county's political workers agreed."² This is not only a popular opinion. One of the great American theologians and political theorists has titled a basic work, "Moral Man and Immoral Society."³ A famed American political scientist has titled his most widely read book, "Politics: Who Gets What, When, How."⁴ And the axioms of our Founding Fathers are frequently repeated: that government is best which governs least; government is a necessary evil; and, if men were angels, government would not be necessary.

This all-pervasive contempt and distrust for politics startlingly contradicts the democratic ideal that through self-government the people protect and perfect themselves. Government and politics in the United

States have become something to be protected *against*, used only as a last recourse, and then, forebodingly. We have an anti-political ethic and a social system designed to frustrate politics. We separate state and society, church and state, economics and politics. We circumscribe what is left by a written constitution and call it the political sphere. Then, within it we prohibit, fragment, and divide politics, and we idealize the result as the Bill of Rights, the separation of powers, and federalism. If there is a "genius of American politics," it is that we probably exist under the most inefficient and ineffective political system ever *deliberately designed* to be so by man.

A clue to the cause of our unique anti-politics may exist in the Wayne County opinion survey. Only ten percent of the people polled stated that they would miss politics because it would deprive them of "the opportunity to work for a cause, a political issue, or their personal beliefs."⁵ It may be that politics is not considered a means of social action for the improvement of the community; that politics is not conceived to be the arena for the exercise of public goodness in cooperative action to further the ideals of the community in the pursuit of its common purposes; that government is not considered the indispensable agency of society for the rational and responsible efforts of man to control and direct his destiny; and that the fulfillment of man is not thought to be a social event achieved through the political functioning of the community. In short, we deny the morality of politics.

The term, "moral politics," has an unfavorable connotation in American life. Because of our Puritan hangover, there is a strong reaction to morality in politics as the attempt of dogmatic partisans to legislate private morals upon the rest of the community. Birth control and prohibition are classic examples of such sumptuary legislation. However, public morality refers to the ideals and behavior of men interacting in society — the relations between men in society which, by their very nature and influence, concern the entire community.

No society exists without a public morality, even though as in the laissez-faire ideal, society may make politics merely its caretaker. The United States does have a heritage of political ideals which inspire its public morality, albeit weakly, because the Founding Fathers failed to design a political system for their furtherance. But the chief source of our public morality — that segment of society which most effectively dictates our standards and behavior — is our economic system. For us, the good society is the affluent society, and our national obsession with economic growth rates testifies to it. Our success ethic is primarily based upon gross monetary accumulation; we do not ask what a man has done, but how much he has. The most honored occupations are generally the most remunerative ones, and money in large part also dictates one's class, residence, education, and even church. As one President succinctly phrased it, "The business of America is business."

Now, many people still act politically for moral purposes, and occasionally there are political reform movements striving for some ideal. Possibly an inherent moral sense asserts itself politically, despite our contrary mores and institutions, because politics remains the only rational and direct means of social reform. Yet, even our sporadic moral adventures in politics are frustrated by the massive obstacles to them in our belief system and political institutions. And the deliberate bias against innovative and purposeful political action in our political institutions reacts upon reform movements by frustrating the idealism of the reformers and tarring their reforms as radical.

Historically, as in the Civil War and Great Depression, when political reform has become necessary to survival, it has become automatically vulnerable to the charge of constitutional immorality. The frequent validity of the charge and the sympathetic response to it from an anti-political people have made political reform easy to cripple and costly to consensus. Nevertheless, circumventions of constitutional rigidities have evolved and minimal governmental changes have been accomplished. Yet, the dissension engendered and the hit-or-miss circumventions employed have made American politics the paradise of pressure groups. A cursory reading of American history will reveal that the strong, innovating Presidents from Washington to Roosevelt have failed to achieve their goals and have spent their last years in office in bitter frustration.

The political progress that has been achieved has been prescriptive, not rational. Furthermore, it has been purchased by massive handouts and wholesale exemptions to any organized pressure groups possessing the abundant *liberum veto*es of our political system. We constantly confuse big government with strong government. The political analyst, Walter Lippmann, states:

Modern democratic governments are, to be sure, big governments, in their personnel, in the range and variety of their projects, the ubiquitousness of their interventions. But to be big is not necessarily to be strong. They are, in fact, swollen rather than strong, being too weak to resist the pressure of special interests and of the departmental bureaucracies.⁶

American political thought has rationalized our anti-political ethics and institutions into the theory of the consensual majority.⁷ The theory holds that there is no common purpose in governing, no single agency with the power to govern, nor any single majority conferring the authority to govern. Rather, there are a number of distinct political interests which have their own majorities and possess control over some part of government. To accomplish any political action, a consensus must be achieved among these distinct interests, each of which has a veto power of some sort at different points in the governing process. The theory of the consensual majority is an idealization of the reality of our political system, not of a vision of what ought to be. On the basis of the reality of the consensual majority, James

MacGregor Burns, the biographer of President Kennedy, foresaw the likelihood of the old frustration for the New Frontier.⁸ In his recent book, *The Deadlock of Democracy*, Burns diagnoses the causes of our systematic frustration of political action:

And so today we face the Madisonian idea built into a system of entrenched power. We face a four-party system that compels government by consensus and coalition rather than a two-party system that allows the winning party to govern and the losers to oppose. While the demands on our government pile up at a feverish pace, the system shows no sign of relaxing its grip on the levers of action. This system is rooted in our constitutional arrangements, electoral behavior, party institutions, and machinery of government.⁹

Burns adds that "above all, this system is rooted in our minds."¹⁰ It is, but at the deepest level our anti-political ethic is rooted in a misconception of morality and the denial of politics as its social instrumentality. For political action to become the dynamic of society, politics and its focal institution, government, must be regarded as the indispensable means for the moral progress of men in society.

The concept of moral politics has an ancient lineage. In fact, it is concomitant with the idea of politics itself; i.e., of governing conceived as a specialized process of society in which citizens participate and groups compete to determine the rulers and their policies. It is among the Greeks of the classical polis that politics as a social function became a conscious and articulated activity of man. Ernest Barker, the classicist, states the basic concept of the classical political thinker:

Political science must be for him the ethics of a whole society, which coheres in virtue of a common moral purpose: it must determine the "good" of a such a society, the structure by which its "good" will best be realized, the action by which its "good" will be best secured. Between political science thus conceived and ethics, there is for Aristotle no essential difference. The good of the individual is ideally the same as the good of the society; his virtue is ideally the same as that of his State.¹¹

To put it succinctly: "Both by Plato and Aristotle the positive furtherance of goodness is regarded as the mission of the State."¹² Thus, the good man can only come into being in the good state, and the good state is created by good politics. If man is to have the opportunity to be virtuous, to be good in action, politics must present the possibility of creating the good state as an arena for good in action, with politics itself as active morality. In an exaggerated form, the case of Adolf Eichmann epitomizes the concept. It would seem from the testimony and the evidence against Eichmann that he was the good citizen of the bad state created by immoral politics. As a consequence, the good citizen becomes the evil embodiment of the bad man.

Many forces have intervened since the decline of the Greek city-states to weaken the concept of moral politics. The magnitude of the Roman Empire and its military ethos and administrative requirements made moral politics seem parochial and impractical. The moral function of politics was sidetracked by the rise of Christianity with its

monopolistic claim on morality. The Protestant Reformation with its emphasis on moral individualism and the proliferation of religions with conflicting and competing claims to moral supremacy accelerated the separation of morality and politics. The advent of capitalism and the repudiation of the moral authority of the feudal aristocracy spawned that weird monster, "laissez-faire," which proclaimed the moral abomination called the separation of politics and economics. Moreover, laissez-faire insisted upon the inherent morality of the independent economic system, maintaining that economic activity naturally and spontaneously generates and maintains public morality; the political system is merely the subordinate caretaker for the economic system.

Long before Adam Smith delivered the classic statement of moral economics, Hobbes gave the secular justification for the separation of morals and politics. He saw politics as the amoral function of maintaining order in society, while the good life went on in society at large. Prior to Hobbes, Machiavelli had also helped to dispose of moral politics by previewing the triumphant modern religion of nationalism. He theorized the amoral *raison d'etat* in which the ultimate morality of patriotism justifies all political immorality committed in furtherance of it. Machiavelli's reward is to be considered the father of modern political science which, through his "de-moralizing" of it, has become an ideological technology.

The grotesquerie of nationalism as moral politics is symbolized in a *Christian Science Monitor* report:

Commemorating and symbolizing the mission and achievements of the Strategic Air Command fliers, ten dramatic glass stained windows have been dedicated in the chapel of Offutt Air Force Base, home of SAC headquarters.

Located adjacent to the altar, the main window portrays the determination of the SAC combat crewman to his task of keeping the peace through deterrent power.

Theme for the window is taken from Isaiah 6:8—
"Whom shall I send, and who will go for us? ...

Here am I; send me."¹³

Lastly, modern science is a powerful dissolvent of moral politics. The dogmatic extension of its methodological positivism to all forms of knowledge led to the rejection of any form of knowledge not conforming to its criteria. As moral norms cannot be proven scientifically, political morality became a matter of subjective preference, pragmatic expediency, or cultural adaptability. On a "take it or leave it" basis, with any moral standards ultimately as flimsy as any others, politics became the pursuit of power for personal or group aggrandizement.

The mechanistic premise of modern science also challenges a basic premise of any moral politics. Science tends to analyze all things in terms of their components and explain their operation as a self-contained mechanism. Science does not resort to purpose in nature or the natural function of things in order to explain them. Yet, if moral politics

is not to be merely cultural conventionality, it requires some kind of a transcendent moral standard — some idea of natural law, however it is defined. Professor Strauss expresses the classical idea:

To determine what is by nature good for man or the natural human good, one must determine what the nature of man, or man's natural constitution is . . . The good life is the life that is in accordance with the natural law of man's being, the life that flows from the well-ordered or healthy soul. The good life, simply, is the life in which the requirements of man's natural inclinations are fulfilled in the proper order to the highest possible degree, the life of a man in whose soul nothing lies waste. The good life is the perfection of man's nature. One may therefore call the rules circumscribing the general character of the good life "the natural law." The life according to nature is the life of human excellence or virtue, the life of a "high-class person," and not the life of pleasure as pleasure.¹⁴

Because scientific knowledge so far only extends to the mechanistic or physical nature of man, science finds no unique nature or distinctive natural function of man in moral terms. Consequently, in an age of science, nature as the ultimate justification or standard for moral politics lacks scientific sanction, and morality becomes a delusion or a ploy.

The Social Consequences of the Denial of Moral Politics

Initially one does not have to grapple with the question of the nature of man to come to grips with the problem of the denial of moral politics. Moral politics can also be considered an operating principle of a viable political system, and our rejection of it is evidenced in the mounting contradictions and failings of our society. Our ideals, our religious beliefs, our social goals, our very political ideology, are repudiated or daily grow dimmer in the material facts of our existence.

"The Great American Celebration" of our nation's progress is based upon a narrowly selective view of our history, and, even then, the most significant fact of it may be that our nation was momentarily exempted from the normal conditions of social history. In the 19th century the United States could develop in a cultural incubator, isolated from foreign enemies, confronted only by a stone-age and disorganized internal enemy inhabiting an underpopulated, unexploited continent. But was the moral need for rational political direction and control of society to further its common purposes and ideals really suspended by fortuitous historical circumstances? Or is it possible that we have been hypnotized by the gross material success of our unrestrained exploitation of a continent's natural resources? Is it possible that political equality has been extended almost as an economic by-product to prevent political dissension from interfering with economic exploitation? It is said that our political rights and ideals were all framed and proclaimed prior to our democratic system. The glaring exception is the emancipation of the slaves, and our political system proved unequal to it; civil war was necessary.

If our political ideals are more than ideology, the 19th century does not present an unblemished record of dramatic achievement. There was the systematic genocide and concentration camp incarceration of the American Indian. The Southern culture, and later an untouchable caste system, was erected upon Negro slavery. Racial and religious persecution abounded and were abetted by the political system. American militarism plundered the Mexicans of an empire and expanded into foreign domains. Finally, the waste and destruction of the natural resources of our own continent in pursuit of private gain stands as a hideous monument to the abandonment of moral politics.¹⁵

In the 20th century we are no longer insulated from history or possessed of boundless resources in an underpopulated continent, and we are faced by a foreign rival with a dynamic and disciplined political system. George F. Kennan, former ambassador to the Soviet Union and an authority on international relations, states our problem:

If you ask me — as a historian, let us say — whether a country in the state this country is in today: with no highly developed sense of national purpose, with the overwhelming accent of life on personal comfort and amusement, with a dearth of public services and a surfeit of privately sold gadgetry, with a chaotic transportation system, with its great urban areas being gradually disintegrated by the headlong switch to motor transportation, with an educational system where quality has been extensively sacrificed to quantity, and with insufficient social discipline even to keep its major industries functioning without grievous interruptions — if you ask me whether such a country has, over the long run, good chances of competing with a purposeful, serious and disciplined society such as that of the Soviet Union, I must say that the answer is “no”.¹⁶

Kennan concludes, “The answer to a growing futility and danger in our international relations lies partly in a new sense of national purpose and in a new act of determination to order the resources of this country in such a way that they can be effectively wielded to that purpose.”¹⁷ The ordering of resources to effectuate national purpose or a nation’s ideals presupposes a moral use of politics, and it requires a dynamic political system to do the ordering in pursuit of the purpose.

Our Founding Fathers had a national purpose — a clear sense of the traditions of civility of our Western heritage. That purpose has had, and continues to have, an effect upon our national life and development. It has enabled the United States to stand before the world as the exemplar of the democratic ideal. It has served as a hope and aspiration for the oppressed of all nations. But the Founding Fathers were mortal men, children of their times. Unduly optimistic about the conditions of the New World, they failed to perceive the debt that the “human” in human nature owes to the rational direction of society — the political function of governing. Unduly pessimistic about man’s exercise of political power, they sought to exorcise it by minimizing it and making it the satan of our political mythology. Thus,

we have national purpose of the highest order, but we have no sense of how to carry it out.

A national purpose is the end or goal of a nation's political system, its vision of the good life. But, if it is not just an abstract sentiment, a goal presupposes the means of achieving it and consensus about it among the groups striving for it. A politics of national purpose would approximate the classical concept of "the ethics of a whole society, which coheres in virtue of a common moral purpose." Without a political system structured upon a common moral purpose and designed to achieve it, national purpose becomes patriotic sentiment, individualistic interpretation without political effectiveness, or, worse, casuistic reasoning which becomes ritualistic ideology. It is absurdly metaphysical to believe that some agency other than government can achieve the common moral purpose by other than rational means. In our political thought we have flitted from one metaphysical absurdity to another because we have been unwilling to give up our ideals, but even less willing to invest politics with the power to further them.

Perhaps our ideals are ideology, and moral purpose a supernatural delusion. Then, national purpose, ideals, and public morality itself are a part of our political mythology for maintaining the status quo. However, if one believes that our principles and ideals should constitute the moral purpose of our society, then a dynamic political system for the rational direction of society toward its moral purpose is an inescapable necessity. All our reason, sense of reality, and experience point to the need for concrete and conscious means to effectively attain human goals. The detractors of rational, moral politics who continue to uphold the validity of national purpose and political ideals must retreat to luck or magic; there is nothing else.

Moreover, it would seem that to deny moral politics is to deny moral man. Man's actions can be considered moral when he acts as the good citizen in obedience to the state; man's actions can be considered moral when he acts as the creature of habit inculcating the customary morality; but the highest morality of man as a conscious, thinking human being participating in the determination of the most important actions of his existence cannot be aspired to without a moral politics. The most important actions of man's existence — war and peace, sickness and health, work and education, progress and posterity, crime and legality — are not individually, but socially, determined. Only when their social determination is within the competence of politics does the individual man have an opportunity to consciously and rationally influence the major decisions of his life. When the crucial decisions of social existence are made by historical, social, and economic processes beyond the possibility of man's rational and responsible control, democracy's claim to moral freedom is specious.

There may be no free will and no need for freedom as a requirement of morality. There may be no morality and no need for a rational,

responsible politics to fulfill the moral purposes of society. However, even the cynics concede that men must believe in the morality of their society, if it is to cohere and they are to function socially within it. Moral freedom as a part of democracy's legitimizing myth cannot be sustained when the competence of politics is limited to social trivialities.

One of the causes of political apathy and alienation in our time is the perception by the citizenry of the meaninglessness of their participation in politics. An empirical study of political alienation in Boston concludes that "sufficient information is available from other American cities to indicate that feelings of political alienation are widespread."¹⁸ The deadly implications for our belief system are in the generalizations which the study makes. The authors state:

These feelings of the electorate go beyond resentment toward the particular candidate in this election; they indicate a widespread disgust and disillusionment with the political process and politicians in general. "Voting wouldn't do any good — both no good." This negativism fosters a belief that reform is impossible and highly unlikely, and that it makes little difference which candidate wins the election. . . . Under these conditions, politics, as it is characterized in American political folklore, tends to lose its meaning. The average voter believes that he is not part of the political structure and that he has no influence upon it.¹⁹

The authors clarify the meaning of political alienation and its consequences:

Political alienation is the feeling of an individual that he is not a part of the political process. The politically alienated believe that their vote makes no difference. This belief arises from the feeling that political decisions are made by a group of political insiders who are not responsible to the average citizens — the political outsiders. Political alienation may be expressed in feelings of political powerlessness, meaninglessness, estrangement from political activity, and normlessness.²⁰

Aside from the particular causes of political alienation which the authors found in Boston, a sense of the rejection of moral politics as an underlying cause pervades the entire study. And the corrosion of democratic community and the social functioning of its members would certainly seem to be a consequence of powerlessness, meaninglessness, estrangement, and normlessness.

One of democracy's deepest problems is that its very permissiveness prevents its myths from becoming deliberate deceptions of a cynical elite. True believers or competing elites will expose the deception or the hollowness of moral pretensions in ideals which serve merely as an ideology. There must be some invigoration from reality for political myths and some fulfillment of political ideals in reality, or man will cease to believe in the "rightness" of democracy. And, when democracy has lost its legitimation in the beliefs of its citizens, can one hope that the material rewards of the affluent society will supply the discipline and inspire the sacrifice to counter a disciplined and dedicated rival way of life?

The City of Pigs or the Good Society?

The political inability of democracy to progress toward the concept of the good life embodied in its own ideals is writ large around us. However, in the broad perspective of history, probably the most telling indictment of our failure to fulfill our ideals is in the use we make of nature's resources. All previously existing societies have had to build upon economies of scarcity. Many of their social institutions and arrangements which ideally were unjust could be justified by the primary necessities of survival and building a civilization upon the margin of subsistence. In contrast, in the United States we are plagued by underconsumption and overproduction. How do we dispose of our overproduced "common wealth?"

In 1956, Edwin L. Dale, Jr., of *The New York Times*, surveyed our consumption habits. Since there have been no significant reforms since then, it is fair to assume that the proportions involved continue to prevail. He found that we spent 27 billion dollars on automobiles and attendant expenses — almost three times as much as we spent on all public construction. We spent 15 billion dollars on smoking and drinking — and only a half billion dollars more on all public and private education. We spent 3.2 billion dollars on radios, T.V., and phonographs; we spent 3 billion dollars on recreation goods and supplies; we spent 2.9 billion dollars on entertainment admissions — roughly about five times as much as we spent on books, .6 billion dollars, or on basic research, .5 billion dollars. The list can be multiplied, but Dale concludes:

Assuming — and there will be little argument with the assumption — that American society as a whole should have spent more money on education in the past decade, the reason for our failure to do so is not really to be found in our luxuries and our national spending habits. It is to be found much more in our institutions, in the mechanics of our system. Rural-dominated state legislatures, the Federal-state system of government, the infinite capacity of local government for delay — these are the reasons.²¹

Our political system is a major villain, then, in our irrational luxuries and spending habits, but to what extent are we responsible for our political system?

A survey in 1960 reported that 11 billion dollars was spent on advertising in 1959, while total expenditures for public schools in 1958-1959 were only 14.5 billion dollars. In that year, the educational expenditure was three percent of the gross national product, while 8.5 percent was allotted to the Department of Defense, which sum amounted to over half of the entire federal budget. That defense expenditure was over twenty-two times as great as the welfare expenditure upon aged, needy citizens, of whom, out of 15½ million over 65 years of age, 60 percent had less than \$1000 a year to live on.²²

Moreover, despite underconsumption and overproduction, we still have glaring poverty in the United States. In 1957, eight percent

of all families received total incomes of \$1000 or less, and nearly one-third earned under \$3000. Fewer than one family in five made as much as \$7500. The bottom ten percent received only one percent of the nation's gross income, while the top ten percent received 29 percent of all income. Lastly, the bottom 30 percent received only eight percent of the nation's income.²³ Merely in terms of efficiency, let alone justice, this is an odd record for an economic system which claims an inherent morality and rationality and a mystic dispensation from political direction and control.

John Galbraith in *The Affluent Society* has termed our economic system one of private luxury and public squalor. He states:

The family which takes its mauve and cerise, air-conditioned, power-steered, and power-braked automobile out for a tour passes through cities that are badly paved, made hideous by litter, blighted buildings, billboards, and posts for wires that should have long since been put underground. They pass on into a countryside that has been rendered invisible by commercial art. (The goods which the latter advertise have an absolute priority in our value system. Such aesthetic considerations as a view of the countryside accordingly come second. On such matters we are consistent.) They picnic on exquisitely packaged food from a portable icebox by a polluted stream and go on to spend the night at a park which is a menace to public health and morals. Just before dozing off on an air mattress, beneath a nylon tent, amid the stench of decaying refuse, they may reflect vaguely on the curious unevenness of their blessings. Is this, indeed, the American genius?²⁴

Galbraith believes that the impetus for social reform of our economy is weak because the majority are no longer poor. Not only can the politician make little mileage from advocating political reforms in public expenditures or from advancing the cause of the poor, but the middle classes are sapped politically by their affluence and attention to private wants.²⁵

We cannot invest in people, either educationally or in reforming our economic distribution, even though our political ideals proclaim their natural rights and a primary right to equality of opportunity. We cannot invest in the public welfare because it is not a part of our commercial ethos nor is it a rational function of our economic system. Galbraith says, "Investment in individuals is in the public domain," but "there is an active discrimination against investment in the public domain and hence in any part of it."²⁶ In short, improving man and redressing social balance between luxury and public squalor would require a political system capable of carrying out our ideals — a moral politics.

In a philosophic interpretation of our economic plight, Hannah Arendt states, "We have almost succeeded in leveling all human activities to the common denominator of securing the necessities of life and providing for their abundance. Whatever we do, we are supposed to do for the sake of 'making a living'."²⁷ Arendt defines the public world or political realm as the social place for the exercise of excellence, and she finds its loss to be a major factor in our modern malaise. She

adds that as long as politics remains the possession of modern economic man, "there can be no true public realm, but only private activities displayed in the open."²⁸ Her conclusion is:

The last stage of the laboring society, the society of jobholders, demands of its members a sheer automatic functioning, as though individual life had actually been submerged in the over-all life process of the species and the only active decision still required of the individual were to let go, so to speak, to abandon his individuality, the still individually sensed pain and trouble of living, and acquiesce in a dazed, "tranquilized," functional type of behavior. The trouble with modern theories of behaviorism is not that they are wrong but that they could become true, that they actually are the best possible conceptualization of certain obvious trends in modern society.²⁹

Democratic man was not intended by the democratic prophets to be economic man; that is an unintentional consequence of democracy for them, though it is not an unforeseen consequence of democracy for the classicists. The classicists were aware that the tendency in democracy is toward the leveling of man, and they wished to elevate man to his highest potential. They believed that man's potential could only be fulfilled through an entire society working toward it under the political direction of its best men. Their answer to the question of what is the best regime was that regime in which there is the rule of the best.³⁰

Within the democratic framework of elections and responsibility to all the people, the answer to the question of the best regime remains the same. Democratic values and institutions must facilitate the political action and leadership of Jefferson's natural "aristoi." Otherwise, the less capable and dependable the rulers, the more politics must be denied power to direct and control society. Certainly, one reason for endorsing constitutions which severely limit political power is the decline in the quality of the rulers. Yet, if the fulfillment of the potential of each member of society depends in good part on the leadership and quality of its politics, society is confronted by a vicious circle that must be broken.

Again, in the United States the denial of moral politics through institutionally frustrating the rule of the best is a matter of historic record. With the exception of the early years of the Republic, our best men have gone into business in order to pursue American society's most bountiful rewards of power and prestige. And in business they have pitted their prestige and power against the control and direction of politics.

The most glaring example of our unwillingness to face the problem of the rule of the best is in the office of the Presidency.³¹ The Presidency has concentrated in it more potential political power than any other elective office in the world, but its exercise is dependent upon the discretion, ability, and personality of the individual who occupies the office. Furthermore, the President is a solitary, unitary executive serving for a fixed term of office and limited neither by collective cabinet

responsibility, nor by parliamentary confidence, nor by a responsible, disciplined political party system. The extra-constitutional nature of presidential power is best comprehended by Corwin's judgment that it is a function of "crisis and personality."³²

The occupant of this most important political office in the free world is chosen in one of the most capricious manners imaginable. He is chosen in a national convention of state political parties that are disunited on everything except a temporary confederacy to capture the patronage and power that accompanies the Presidency. These state political parties have no agreement on policies or principles, and they are neither responsible for their choice nor bound to him. Consequently, they choose their candidate on the basis of the saleability of his personality, his inoffensiveness to party factions or voting blocs, the electoral votes which he may swing from his home state, the political deals which he can make for future presidential favors, and his success in the personality contest of presidential primaries. It is seldom that a recognized political leader with national experience becomes a presidential candidate, for he would have had to take a stand on issues and his political position would be known. He would have antagonized certain political interests and groups, and that would interfere with the marketing of a personality. The most fitting commentary about our capricious selection of Presidents is to call to mind the political experience and accomplishments of two of our latest presidents, Eisenhower and Kennedy, and ask why they were selected as candidates.

There have been good Presidents, but their infrequency is not very reassuring in an age of continuous crisis. Moreover, a quick examination of presidential history will serve to indicate that they were not the predictable result of a rational system of selection. The defenders of the Presidential office attribute the good Presidents to the mystique of our democratic system, and they ridicule the possibility of any better method. Their ridicule of rationality in politics and their affirmation of faith in some kind of democratic determinism is another denial of conscious, responsible politics.

The converse of the equalitarianism which blinds us to the problem of the rule of the best is our refusal, in matters of race, to fulfill the principle of equality. We proclaim equality as the basic principle of democracy, but we live in a deeply rooted caste system which violates the spirit and word of our laws. Could there be any more pernicious and penetrating manner of subverting the morality of politics? The Negro caste system not only violates our basic moral premise of equality, it also flaunts an essential principle of justice in the Western heritage; namely, the sovereignty of the laws. In the *Laws* Plato stated:

It is really necessary for men to make themselves law and to live according to laws, or else to differ not at all from the most savage of beasts. The reason thereof is this: that no man's nature is naturally able to perceive what is of benefit to the civic life of men and, perceiving it, to be alike able and willing to practice what is best.³³

The violence that has occurred since the Supreme Court decision against school segregation demonstrates anew the continuing truth of the sovereignty of law as the keystone of civilization. In *An American Dilemma*, Gunnar Myrdal states:

At bottom our problem is the moral dilemma of the American — the conflict between his moral valuations on various levels of consciousness and generality. The "American Dilemma," referred to in the title of this book, is the ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the "American Creed," where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations of specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.³⁴

The moral conflict between the "American Creed" and our social behavior taints our political system with its hypocrisy. When a people live in daily violation of their basic political ideal and the laws that supposedly give force to it, they cannot help but regard as tainted the political wellspring of their public morality.

A political system which does not carry out the spirit of its laws impugns the spirit and, thereby, impairs the effectiveness of the laws. When the ideals which invest the laws with the sense of being "naturally" right are considered to be powerless sentiments, the laws come to be looked upon as prizes for which the powerful compete and use in their own interest. Then, the laws will be considered by the citizenry not to be legitimate expressions and applications of the national purpose of ideals, but to be personal edicts of the powerful. Law, as personal edict, is a matter of fear, not conscience — and it is a part of the game to avoid it, evade it, lobby against it, and restrict its exercise by constitutional constraints. As in the segregation issue, custom will be appealed to against law. Once again, society as the subconscious and irresponsible prevails over politics as the responsible and rational.

The crime rates of the Negroes are testimony to the breakdown of the laws; the violence and backwardness of the South stamp it as the focal point of a national infection; and the homicide rates in the United States, which are the highest in the Western world, testify to the spread of the infection.³⁵ Finally, while the United States as the leader of the free world and exemplar of democracy competes with Communism for influence over the new nations, most of them colored, newspaper headlines report to the world the latest persecutions and discriminations against Negroes carried on within the confines of our political system. Discrimination and persecution are persistent flaws in human nature, but a political system which permits and encourages them in defiance of its own ideals needs no Communist propaganda to bear witness to its own shortcomings.

Progress in race relations has been made, and our political system has adapted to it. But, the political system has only adapted to it; the political system has not educated and led society; that is the indictment of it. Public morality has advanced against racial prejudice, but, much of the time, in spite of the political system. Consequently, the cost in time, unity, lives, wealth — or, simply, justice — has been inordinate. After bloody civil war *incidentally* emancipated the slaves, our political system required one hundred years more to take another major step in race relations. That change — the outlawing of segregation by the Supreme Court's application of the equal protection of the laws clause of the Constitution — had to be accomplished by a non-democratic agency reversing its own precedent and engaging in judicial lawmaking. Moreover, legal segregation of Negroes is rapidly being replaced by their geographical segregation in the cities, and the political system acquiesces either by doing nothing or, worse yet, encouraging it by specific housing policies.

The genius of the American political system for delay, special interest group veto, irresponsibility, is fully demonstrated in race relations. The constitutional division of power known as federalism leaves the states with the police powers — health, safety, morals, and the public welfare. When the national government acts in these areas, it must either buy the cooperation of the states through grants-in-aid, or it must have the federal courts declare that its constitutionally delegated powers supersede the residual powers of the states on the point at issue. However, as the general police power is possessed by the states, they can take positive actions of all kinds to maintain their parochial customs. And where their positive action conflicts with national power, the states by refusing to exercise their police powers can allow social groups to enforce local customs virtually immune to national power.

Even on the national level, however, strong, positive leadership and education in advance of community sentiment are unlikely. Congress is built upon the representation of local interests and, oftentimes, the narrowest ones. And this bias of its construction is not alleviated by a national party system imposing some responsibility for national policies. As Burns states:

We still underestimate the extent to which our system was designed for deadlock and inaction. We look on the current impasse in Washington as something extraordinary rather than as the inevitable consequence of a system we accept. We look on the failure of the national government to act as the result of poor leadership or bad luck or evil men, and we search for scapegoats.³⁶

What the American people have never comprehended is that certain social actions are necessary or inevitable, and when the political agency of society does not undertake them, they will devolve by default upon private groups. The question is whether those social actions can be

exercised better by private groups which are neither accountable to society nor pledged to its public interest. In part, any answer is based upon the limited capability of government and the need for individual freedom among men, but, more deeply, our cultural answer is based upon metaphysical assumptions about the natural harmony of social groups and the social constructiveness of their selfish competition versus the inherent corruption of politics. In every major problem area of American life, our political system confounds constructive action instead of facilitating it. Yet, we continue to evade the question of political power and its relation to public morality by retreating to 19th century slogans of evil government and parasitical politics.

Our inability to solve our social problems because of our rejection of their political nature can be summed up by considering the issues of education and health. Our consciousness of a crisis in education dates back to 1955 when the Russians launched their first Sputnik. The figures on our national expenditures, which have been cited, show our weak economic response to that crisis. Our continuing recognition of the crisis and our continuing inability to resolve it can be observed in one of President Kennedy's messages to Congress. He stated:

Our progress as a nation can be no swifter than our progress in education. Our requirements for world leadership, our hopes for economic growth, and the demands of citizenship itself in an era such as this all require the maximum development of every American's capacity.³⁷

The President added that though educational progress has been substantial, "the needs of the next generation — the needs of the next decade and the next school year — will not be met at this level of effort." The federal government must give aid, but the President quickly qualified the assertion:

Education must remain a matter of state and local control, and higher education a matter of individual choice. But education is increasingly expensive. Too many state and local governments lack the resources to assure an adequate education for every child. . . .

Our twin goals must be: A new standard of excellence in education — and the availability of such excellence to all who are willing and able to pursue it.³⁸

Congress rejected the President's proposals for achieving his twin goals, and one year later he sent Congress another message:

No task before our nation is more important than expanding and improving the educational opportunities of all our people. The concept that every American deserves the opportunity to attain the highest level of education of which he is capable is not new to this Administration — it is a traditional ideal of democracy. But it is time that we moved toward the fulfillment of this ideal with more vigor and less delay. . . .

Today, more than at any other time in our history, we need to develop our intellectual resources to the fullest. But the facts of the matter are that many thousands of our young people are not educated to their maximum capacity — and they are not, therefore, making the maximum contribution

of which they are capable to themselves, their families, their communities, and the nation. Their talents lie wasted — their lives are frequently pale and blighted — and their contribution to our economy and culture are lamentably below the levels of their potential skills, knowledge, and creative ability. Educational failures breed delinquency, despair, and dependence. They increase the costs of unemployment and public welfare. They cut our potential economic output by billions. They deny the benefits of our society to large segments of our people. They undermine our capability as a nation to discharge world obligations. All this we cannot afford — better schools we can afford.³⁹

In this passage, our highest elected official states succinctly and factually the political obligation and the public interest in the educational crisis. But it is immediately followed by the inevitable disclaimer: "Let us put to rest the unfounded fears that 'federal money means federal control'."⁴⁰ Thus, the activity of spending money by diverse authorities for multiple purposes will somehow fulfill the national purpose, and without the politics of "federal control."

Even without federal control Congress found Kennedy's educational bill too political, for it was not passed. The most depressing feature of this sad fiasco is that after Kennedy outlined the pressing national need for educational changes, he found present political institutions satisfactory for making the changes. There is no recognition whatsoever that the lack of vigor and the delay in fulfilling the "traditional ideal of democracy" is not a financial matter; that radical changes in political results call for radical changes in the constitution of politics.

Power in education is fragmented and de-politicized by dividing it among thousands of local school boards and insuring that school board elections are non-partisan, non-competitive, and non-programmatic — i.e., non-political. Even then the school boards do not turn education over to the professional administrators as a matter of technical expertise, for they continue to exercise control over the basics of finances and standards. The answer of the American citizen to any criticism of this method of state and local control is that it is the only way to keep politics out of education. Along with President Kennedy, the citizenry may grant that there is a national responsibility for education because it so directly affects the national interest, but the citizenry would deny, as Kennedy did, any need for politics in carrying out the national responsibility.

John Stuart Mill has considered the political system as the machinery whereby collective action of the members of the community is organized and directed. He states:

All these things are not the power, but the machinery for bringing the power into contact with the obstacle: and the machinery has no action of itself, but without it the power, let it be ever so ample, would be wasted and of no effect.⁴¹

President Kennedy had faith in the power of the community to resolve the educational crisis, but neither he nor the community were

prepared to provide the machinery for bringing the power into contact with the obstacle.

The divorce of the community good from its political exercise is tragically evident in the issue of medical care. Again, President Kennedy followed the footsteps of his two predecessors and proposed remedial legislation, and Congress rejected the proposals. The rejection of medical care by Congress is itself a sad commentary on the paralysis of our political machinery, but there is an even more neglected and grievous aspect to the public problem of health. We are blind to the political dimensions in the environmental causation of ill health and to the necessity of political action in creating and maintaining a healthy environment.

Our faith in modern science is in part responsible for our blindness to the social problem of health. We expect from science specific cures for the specific ailments that afflict us. This leads us to demand from the welfare state the financing of more and more medical care to treat individually our private ills. Yet, we ignore the social causation of illness and its political cure. Dr. Herbert Ratner, a professor of preventive medicine and public health, states:

To put it in its broadest perspective, we make health an end in itself. This is a sign of our materialism. We have forgotten that health is really a means that enables a person to do his work and do it well. There is another paradox here: we are the wealthiest country in the world — yet one of the unhealthiest countries in the world. Dr. Paul Dudley White, President Eisenhower's physician, has made the allegation of unhealthiness on numerous occasions. I would agree with him about our low-level wellness in America. We are flabby, overweight, and have a lot of dental cavities, fluoridation notwithstanding. Our gastrointestinal system operates like a sputtering gas engine. We can't sleep; we can't get going when we are awake. We have neuroses; we have high blood pressure. Neither our hearts nor our heads last as long as they should. Coronary disease at the peak of life has hit epidemic proportions. Suicide is one of the leading causes of death (fourth between the ages of 15 and 44). We suffer from a plethora of the diseases of civilization.⁴²

Ratner adds that Americans "think of health as something that can be bought, rather than a state to be sought through an accommodation to the norms of nature. We have become increasingly a paying animal, as if health were solely a commodity of the market-place."⁴³ Even health in our affluent society has become just another economic consideration. However, if people did believe that there were norms in nature, in our modern urban-industrial state there would be only a very limited power to accommodate them individually. In a book appropriately titled *The Mirage of Health*, the microbiologist Rene Dubos comments:

Above and beyond economic considerations there are aspects of Western culture which are incompatible with the incessant claims that we have come close to the millenium of good health. . . . We have eliminated some of the greatest and most obvious contaminants of food and drink; but we poison

our atmosphere and endanger future generations as well with the gases of chemical processes, the smoke of factories, the pulverized rubber and exhaust of motorcars, and man-made radiations. We have eliminated from modern society some of the crudest forms of economic injustice; but we operate human relationships on a basis of aggressive competition and of endless striving for success. We have lavishly produced and made available to men a wealth of comforts and earthly goods; but we have denied to most of them the possibility of choosing and of participating creatively in the joy of producing. For too many life in the modern world is a passive experience or a lonely struggle, the wounds of which are reflected not only in damage to the blood vessels of our brains and our hearts but also in the very loss of hope.⁴⁴

Two observations can be made on the basis of these expert diagnoses of health in the United States: first, except in reaction to gross abuses of the environment, we do not use our political system to create or maintain a healthy environment; second, despite an economy of overabundance devoted to the pursuit of pleasure, mental illness is a major health problem in the United States.

The most glaring example of our political abdication of responsibility for health is the automobile. It has killed and crippled more citizens than all American wars. A World Health Organization report states that in 1957 in the United States road deaths "exceeded death from all other forms of diseases combined."⁴⁵ The automobile recklessly lays waste immense natural resources by turning a seemingly durable product into an almost annually consumable item; it blights the land with highways and strangles the cities; and it pollutes the air with carcinogenous gases. Yet, almost all of the injurious effects of automobiles could be remedied easily by legislation. In fact, in many cases legislation — e.g., credit regulations, highway subsidies, traffic laws — spawned our automobile germ culture.

Cigarettes have been revealed to be a major cause of lung cancer and other allied illnesses. Great Britain and several other European countries are waging public health education programs against cigarettes and have placed severe restrictions upon their sale. In the United States, we still pay a subsidy for the growing of tobacco, though we have resorted to the classic ploy of political inaction: a commission has been appointed to report on the problem. Our denial of politics, however, is shockingly revealed in the statement of the Secretary of Health, Education, and Welfare, Anthony Celebrezze, concerning the problem. He believes that "even if smoking is found harmful by a scientific committee now reviewing the evidence, the government should not tell the people to give up cigarettes." He adds, "The findings should be laid before the public for it to decide what action to take," but "I firmly believe that it is not the proper role of the Federal Government to tell citizens to stop smoking."⁴⁶ How the public can decide, let alone take action, when politics is denied *a priori* is beyond rational comprehension. Yet, the denial of politics is itself tantamount to the abdication of social rationality.

The listing of the social causatives of ill health could be indefinitely expanded, but all of them could be remedied by a positive politics that refined opinion by educating it as well as acting when social action is necessary. Dubos writes that 'the great advances against disease in the 19th century were made not by individual medical treatment but by the reform of the social environment based upon philosophical and humanitarian beliefs. He adds:

Similarly, scientific medicine will certainly define the factors in the physical environment which constitute threats to health in modern society. But to fulfill its potentialities it may once more need the help of bold amateurs willing to use empirical methods based on philosophical, humanitarian, and aesthetic beliefs ...⁴⁷

The politically sophisticated citizen must add a pessimistic note to Dubos' call for bold amateurs: Without radical changes in our political belief system and in our deliberately stalemated politics, reformers will dissipate their efforts with little effect other than intensifying their own anti-political attitudes.

The problem of mental health is far more complex than that of creating a physically healthy environment, for it is at the core of the question of the "sane society." Dr. Ratner indicts our society:

The terrible thing in this country is that although we have done a masterful job in curbing deaths from many diseases, especially the infectious diseases, we now have a nation of presumably healthy persons who cannot function well because they are full of anxieties. The most radical condemnation of our society and culture and American character is that one out of ten babies — and there are more than four million born in this country each year — will enter a mental hospital at some time in his life. A recent house-to-house count in one community indicated that one out of eight Americans suffers from a psychiatric disturbance severe enough to warrant treatment. Since the body is for the sake of the mind — it is its instrument — and since bodily health is for the sake of mental health, which is the condition for the "free life," what does it profit a man to gain physical health when he loses the emotional health that permits him to enjoy and use physical health?⁴⁸

When Dr. Ratner implicates society and culture, he implies that health is a function of an entire way of life and, ultimately, "an accommodation to the norms of nature." For Dubos too, it is the social dimension of health that is decisive. He states, "More often than not the pursuit of health and happiness is guided by urges which are social rather than biological; urges which are so peculiar to men as to be meaningless for other living things because they are of no importance for the survival of the individual or of the species."⁴⁹

When health is seen as a function of a society's way of life, we are again confronted with politics. Politics presents the only possibility of rationally structuring society and maintaining that structure in accordance with the "norms of nature." Or, as Strauss says of the classical concept, "The good life is the life that is in accordance with the natural order of man's being, the life that flows from a well-ordered or healthy soul."⁵⁰

Medical care seems to be an ever more inadequate reaction to individual symptoms which leave untouched the underlying and mounting social causes of illness. There may be no such thing as a "healthy soul," but we are having little success operating on our current assumptions. And psychosomatic medicine and cultural psychoanalysis both point in the direction of the classical view of the wholeness of man and the possibility that man may have a distinctive nature with which his social existence must be in accord for his proper functioning. For the classics, man's essence was his reason, and the final justification of the political system was its exercise and development. The good political system was the rational agency of society.

However, in our present dilemma, one does not have to go the length of the rational essence of man to justify politics as the rational function of society. If health can only be understood and flourish in the wholeness of man — from man as an individual mechanism through his social being to his inner spirit — then, a rational politics which seeks to develop and maintain a creative harmony between the dimensions of man is a necessity of the healthy life. The mounting rate of mental illness can be considered the protest of man's thwarted potential nature against a political system which has utterly failed to create a healthy social environment for the whole man.

Because of our denial of politics, we have not even attempted to structure the human relationships which constitute society upon our own concept of the good life — our own ideals of man. Consequently, in the default of politics, our economic system with its immense power over our primitive nature structures our social behavior to its norm. As the health of the whole man becomes the medical care of a mechanism and a monetary matter, so man becomes but an economic unit in the affluent society. He becomes the alienated, rootless, anomic, and depersonalized sub-man of the sociologists' secondary group society. The public morality of the affluent society becomes "the cash nexus" of Karl Marx.

The question of health is the question of the good life. Because we fear politics, we have left the answer up to each individual, though the individual can no more create or maintain the social context of the good life than he can individually handle the healthy environment. By cultural devolution the good life becomes the pursuit of pleasure, the most futile of all mortal pursuits, either as the lust for affluence or as the avoidance of pain.⁵¹

Where does it all end? Two recent books are titled, *The Power Elite* and *The Warfare State*. In the former the author asserts that "an interlocking directorate" of the corporation owners and managers, the military, and the politicians are assuming control over the political system as a result of — and as a contributing factor to — our continuous warlike state.⁵² The second book examines the growing domination

of American politics by militarism and its allied economy.⁵³ Dwight D. Eisenhower, in his Farewell Address, stated:

We annually spend on military security alone more than the net income of all United States corporations.

Now this conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence — economic, political, even spiritual — is felt in every city, every state house, every office of the Federal Government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources, and livelihood are all involved; so is the very structure of our society. . . .

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.⁵⁴

Eisenhower's warning, like America's ideals, lacks a political system for its implementation.. In a political system in which politics is *a priori* corrupt, while private profit-seeking is the mark of success, it seems unlikely that we will be able to forego voluntarily the immense profits of the military-industrial complex. Plato long ago predicted the de-
volution of the affluent society when in the *Republic* Glaucon asked Socrates how he would provide for "a city of pigs." Socrates replied:

The question which you would have me consider is, not only how a State, but how a luxurious State is created; and possibly there is no harm in this, for in such a State we shall be more likely to see how justice and injustice originate. In my opinion the true and healthy constitution of the State is the one which I have described. But if you wish also to see a State at fever heat, I have no objection. For I suspect that many will not be satisfied with the simpler way of life. They will be for adding sofas, and tables, and other furniture; also dainties, and perfume, and incense, and courtesans, and cakes, all these not of one sort only, but in every variety; we must go beyond the necessities of which I was at first speaking, such as houses, and clothes, and shoes: the arts of the painter and the embroiderer will have to be set in motion, and gold and ivory and all sorts of materials must be procured.

Socrates adds, "Then we must enlarge our borders; for the original healthy state is no longer sufficient." The dialogue concludes:

Then a slice of our neighbors' land will be wanted by us for pasturage and tillage, and they will want a slice of ours, if, like ourselves, they exceed the limit of necessity, and give themselves up to the unlimited accumulation of wealth?

(*Glaucon*) That, Socrates, will be inevitable.

(*Socrates*) And so we shall go to war, Glaucon. Shall we not?

Most certainly, he replied.

Then, without determining as yet whether war does good or harm, this much may we affirm, that now we have discovered war to be derived from causes which are also the causes of almost all the evils in States, private as well as public.⁵⁵

Community and Science

We are not confronted with the alternative of "a true and healthy constitution of the State," as was Glaucon. Rather, the modern state

may be beyond redemption. It is so large, populous, and complex that rational control and deliberation in its politics is either constricted to the level of meaninglessness or may require totalitarianism. Either way men become social insects. Though the latter may be army ants, the former are as fully determined by impersonal and tyrannical social forces.

However, if man has a nature with an irreducible core of humanness, society may destroy itself or break down rather than become one of several giant human ant hills. Social organization may become so complex, regimented, and impersonal that it will become dysfunctional to its human units. Man will break down socially (mental illness), rebel (juvenile delinquency or destructive mass movements), or commit social suicide (atomic war).

At the root of the denial of moral politics is the separation of society from man, not so much man's alienation from society, but society's failure to represent and develop the nature of man. More prosaically, in mass society man necessarily becomes an infinitesimal economic unit. But, man as an infinitesimal economic unit cannot politically direct his social destiny in pursuit of his ideals. Society must be drawn in the dimensions of man, if man as a rational, moral being is to control and direct it.

Mass society has hypertrophied community — the society natural to man's political action. The classics in their awareness of the sense and values of community insisted upon colonization instead of empire, and upon the closed instead of the plural society. Because they failed to adjust their political community, the *polis*, to the realities of power it was swept into the dust bin of history; but the *polis* as the natural arena for moral politics has remained the inspiration of humanity.

Possibly, the idea of the *polis* as political community can be applied to the circumstances of modern society to suggest reforms that might lead to moral politics and a more "human" society. However, moral purpose can only become common social purpose in our mass, heterogeneous society through technological or propagandistic means that destroy morality. Our public morality or consensus must remain vague and inspirational; otherwise, society will lose the minimal coherence which the public morality serves to create. Again, in an equalitarian society the sheer force of numbers levels standards to the most common denominator, and the most common denominator of public morality is certainly not a rational, purposeful politics. Another obstacle to moral politics is nationalism. It leads us to accept unquestioningly all things bearing the imprint of the state. But where nationalism is the criterion of all things political, the standard of man's nature has little chance to question society's customs — to challenge "what is" on the grounds of "what ought to be."

Nevertheless, there are steps which could be taken to alter the direction of society without at the same time defying reality. It now

seems apparent that national politics by the very nature of its extent and complexity can be rational and responsible only in a steeply hierarchical representative sense. This may be its salvation, for realistic decision requires knowledge and the independence to act upon it. However, in the process the individual citizen becomes mass audience, and democracy loses its moral *raison d'être*. For politics to become the arena for the exercise and promotion of public morality by the members of society, there must exist the possibility of political meaningfulness for individual citizens. If the limited knowledge, interest, and activity of the average citizen is taken into account, this would seem to require the restoration of the "commune" in local communities, or an attempt to create a modern equivalent of the classical political community.

The desire of men for community would seem to be a factor in the flight to the suburbs, though suburbs aren't communities. A community is an association of men based upon a common way of life who pursue common goals. Its essence is the sense of neighborhood which exists between its members as whole persons. Its ethical purpose is in the fulfillment it offers man as a social being, and in the guidance and direction it provides for man's potential nature. Suburbs are too narrow or selective in their existence to achieve community. Their male members do little more than sleep in them, and both male and female pursue their culture elsewhere. Moreover, the class sameness of the suburb casts the pall of uniformity upon its members. True community achieves unity through the diverse qualities of its members. Some must follow if others are to lead.

Neither is the modern city the answer to community. If it was, people might not have fled to the suburbs. Lewis Mumford has written that the suburbs are fragmentations and the cities are conglomerations. The city completely lacks the shared intimacy and the common goals of community. Its gigantism restricts its members to functional relationships toward one another; they know each other only in the performance of their occupations. And, as the only agreed upon goal of the city is economic, men do not find the moral meaning and action in it that they crave from community.

Yet, local community remains the only possibility for balancing man's political knowledge and concern with his political control. Can some kinds of political communities be created in our time and structured to give them meaning and purpose? The answer can only be speculative, for the efforts to create local communities must be experimental and varied to suit the wide range of local conditions. Furthermore, the past can only be a very vague guide, for any modern communities would be necessarily contained and restricted by our national ideals, economy, and international politics. But it is possible that within this limiting framework associations of people devoted to particular visions

of the good life and united by their shared purpose and communal existence could attain a sense of control over their public affairs. If such political communities were small enough, the individual might come to believe in a moral politics because he could participate politically in his community's efforts to progress toward the good life.

In the past, people have associated in communities for social, religious, economic, or political purposes. If people were again to be motivated to a sense of community, they would have to be given the power and autonomy to fulfill the communal purposes for which they had banded together. Local communities could be chartered to give them the internal sovereignty possessed by business corporations. And, community control would have to extend to matters of public significance. Unquestionably, many people would find certain purposes and powers of particular communities highly obnoxious to them. Yet, dissenters would be free to relocate in another community with commitments compatible to them, or they could remain outside community among the unorganized multitude.

The analogy of the local political community to the business corporation is apt in another way. As corporations are merely a part of the whole, with purposes subordinate to its fundamental purpose, so also the local community would be but a part of a national society. Political community could not be attained by denying the larger community of humanity. Again, our economy is national and our politics are international; the local community could only control that which is local and confined to itself; the nation would control that which is national in scope.

Of course, the major culture would never allow totally antithetical subcultures in the local political communities, but there could be widely varying cultural communities within the broad framework of the ideals and standards of democracy. And, the competition and contrast between them could go a long way toward reversing the mass conformity of modern democracies. It might also assuage the fears of anthropologists who believe that the pervasiveness of Western culture is undermining all other cultures and thereby bringing to a halt human progress through cultural diffusion. If a world culture or government is coming into existence, a means of retaining or encouraging diverse ways of life within the framework of a common humanity would seem mandatory for the individual nature of man.

There is another even more formidable obstacle to any social reconstruction aimed at creating a moral politics; the authority and use of modern science works directly against it. First, science monopolizes knowledge through the criteria which it sets for the definition of knowledge. Because of the immense material benefits of science and because of its demonstrated mastery of nature, its definition of knowledge becomes compelling. Again, within the scientific purview, there is no purpose or goals in all of nature. As far as scientific knowledge is

concerned, the social, the rational, the moral, the purposeful in man are the result of chance, culture, or personal preference.

But, if man does not have a nature which makes certain requirements for its well-being, or if man does not have a potential nature which gives purpose to his society, then the public morality of any society is only its adaptation to circumstances, environmental or historical. And either justification can be challenged by anyone who places himself above society, or who claims that a new adaptation is necessary. The dilemma is posed by Strauss in that it is well-nigh impossible to base a political system upon the fulfillment of man's nature when science has a "nonteleological conception of the universe," of which man is merely a part.⁵⁶

The idea of science as technology also mitigates against a moral politics. In an age of science, when science is believed to be capable of answering all questions, the ideal of politics comes to be technology, the efficient administering of the scientific answers to all the problems of social existence. But, politics is the arena for social action in which man freely chooses among alternative modes of social conduct and seeks to fulfill himself in cooperation with his fellows. It is unpredictable, seemingly chaotic, and never routine, because it is carried on by individuals in society and requires their consent gained through persuasion. It proceeds by cooperation in unity, not coercion in uniformity. And, because the knowledge of politics concerns individuals in society, it is always incomplete knowledge which has to be applied to constantly changing circumstances. Thus, politics is the antithesis of technology as social engineering which seeks to manipulate men toward scientifically preordained goals, and the technological ideal is blind to the genius and function of politics.⁵⁷

Science in its present form may be inherently opposed to the classic conception of political science or the art of politics. Though many scientists assert the separability of science and technology and speak of a pure science, the very procedures of modern science involve experimental manipulation and change of nature to verify and advance the knowledge of science. Modern science is not concerned to know the nature of things in themselves. Its knowledge is of how to affect or change nature, and it is demonstrated by control of natural processes. Scientific knowledge, when extended to man's nature, rules out the possibility of understanding its essence or its relation to the whole. Instead, science adapts all of nature to whatever are the current or conventional preferences of man. Truly, science makes the world man's oyster. But a fully moral politics would have to be grounded upon science as the understanding of the nature of the whole in order to understand man's place in it.

Science will not voluntarily approach nature. However, the steady destruction of man's symbiotic relations with all the rest of nature by the application of science may result in a series of catastrophes such

as Rachel Carson's *The Silent Spring*. N. J. Berrill uses a frightening metaphor when he states:

So far as the rest of nature is concerned we are like a cancer whose strange cells multiply without restraint, ruthlessly demanding the nourishment that all the rest of the body has need of. The analogy is not farfetched, for cancer cells, no more than whole organisms, know when to stop multiplying, and sooner or later the body or the community is starved of support and dies.⁵⁸

Catastrophe may shock us out of our ruthless conversion of all things in nature to our consumption, and it might restore man's reason over his appetite. Without agreeing with de Chardin's vision in *The Phenomenon of Man*, one can agree with him that man's powers of thought have brought man to his present plight, and that only an understanding of the rational essence of man, its operation and obligations, will enable man to further progress. He believes "that life, by its very structure, having once been lifted to its stage of thought, cannot go on at all without requiring to ascend ever higher."⁵⁹ And de Chardin, the natural scientist, finds a natural unity in man which is a part of the unity in nature.

Some natural scientists are thinking about the unity of man and nature, of purpose in nature, of man's reason as evolution's furthest advance, even of morality as a part of man's nature. Dubos quotes Darwin in his belief that the moral sense of man has evolved through natural selection, and Dubos adds that barely one hundred years later Darwin's materialistic concept has itself evolved into the idealistic concept of Julian Huxley. He quotes Huxley:

Finally man (and possibly a few other organisms elsewhere) has entered the human or, as we may call it, psychological phase, which is based on the accumulation of knowledge and the organization of experience. It works chiefly by a conscious selection of ideas and aims, and produces extremely rapid change. Evolution in this phase is mainly cultural, not genetic; it is no longer focused solely on survival, but is increasingly directed towards fulfillment and towards quality of achievement.⁶⁰

It is no coincidence that much of this Aristotelian thinking has occurred in the biological sciences. Rather, it would seem to be a cause for hope in that the biological sciences, among the natural sciences, are most closely allied to the sciences of man. In the opinion of the philosopher, John Herman Randall, even the physicists are moving toward Aristotelian theory or ideas of function and purpose in nature. He states:

Today, the concepts of Aristotle's physics, those notions involved in his analysis of process, have been driving those of Newton out of our theory. That our revolution in physical theory can be so stated is mostly unrealized; but it is often explicitly recognized that the ideas of Aristotle's physics are far closer to present-day physical theory than are the ideas of the nineteenth century...⁶¹

All of this may be only the cry of antiquarian moralists. On the other hand, science itself may be on the way toward a purposeful uni-

verse. Then, purpose and function in politics might again be respectable. As the brain is to man, so politics is to society. And politics is natural, not as a reflection of man's fall from grace, but as the necessary means for completing man's nature. But, neither politics nor man's intelligence are complete or perfect; they are merely potential and their development requires man to exercise his reason and to act politically. Man's ability to choose whether and how he will exercise his reason or act politically is his freedom. Finally, man's moral impulse toward harmony with nature impels him to develop his reason in society and through politics so that as an individual and as a social animal he may achieve fulfillment. And the moral impulse is the human manifestation of purpose in nature.

To conclude, we forfeit the indispensable link in man's fulfillment as a social animal when we reject politics as the rational function of society. Man in his freedom can and has misused politics, and his very reason dictates that he protect himself from its misuse. However, to deny the positive role of politics in man's development is fundamentally to impair government as the cooperative endeavor of men in society to achieve the democratic ideals of equality of opportunity, liberty under the law, human dignity, and the brotherhood of man.

Emerging nations seek a model of a political system to facilitate their development. They will reject a negativist democracy for the dynamic political action which they must have. Robert Hutchins quotes an Indonesian observer on this dilemma of democracy in international relations:

We are so used to identifying democracy with negative freedom that any kind of intervention in the life of the citizen is considered as an act of dictatorship. Democracy becomes an empty form because every content which would give it a certain direction, even in the direction of democracy itself, intervenes in the freedom of the individual or the nation. This is the failure of our democratic thinkers in the past as well as at present, and especially the failure of our democratic leaders after the second world war to see and utilize the possibilities of world organization.⁶²

The United States has reached the stage when its political system must motivate and guide it toward its ideals. The democratic ideal of moral man demands the rationality and responsibility of politics for its actualization. Politics is the indispensable means to our humane goals, but it cannot function through an anti-political ethic. The essence of public morality — the good life in action — lies in the art and practice of politics.

FOOTNOTES

¹ Hadley Cantril (ed.), *Public Opinion 1936 - 1946* (Princeton: Princeton University, 1951), p. 534.

² *New York Times*, July 25, 1959.

³ Reinhold Niebuhr, *Moral Man and Immoral Society* (New York: Scribners, 1932).

- 4 Harold Lasswell, *Politics: Who Gets What, When, How* (New York: McGraw-Hill, 1936).
- 5 *New York Times*, *op. cit.*
- 6 *The Public Philosophy* (Boston: Little, Brown, 1955), p. 48.
- 7 John Fischer, "Unwritten Rules of American Politics," in Bishop and Hendel (eds.), *Basic Issues of American Democracy* (New York: Appleton-Century-Crofts, 1961), pp. 266-278. The source of the theory can be observed in: C. Gordon Post (ed.), *John C. Calhoun: A Disquisition on Government and Selections from the Discourse* (New York: Liberal Arts Press, 1953), pp. 19-54.
- 8 *John Kennedy: A Political Profile* (New York: Avon Books, 1959), p. xv.
- 9 *The Deadlock of Democracy* (Englewood Cliffs: Prentice-Hall, 1963), p. 7.
- 10 *Ibid.*
- 11 *Greek Political Theory* (New York: University Paperbacks, 1960), p. 7.
- 12 *Ibid.*
- 13 "Chapel Windows Dedicated to SAC," *Christian Science Monitor*, June 1, 1960.
- 14 Leo Strauss, *Natural Right and History* (Chicago: University of Chicago, 1952), p. 127.
- 15 Cf. Edmund Wilson, *Patriotic Gore* (New York: Oxford, 1962), pp. ix-xxxiii. Contra, Daniel Boorstin, *The Genius of American Politics* (Chicago: University of Chicago, 1953).
- 16 *Christian Science Monitor*, Dec. 12, 1959.
- 17 *Ibid.*
- 18 Murray B. Levin, et al, *The Alienated Voter* (New York: Holt, Rinehart and Winston, n.d.), p. 58.
- 19 *Ibid.*, p. 61.
- 20 *Ibid.*
- 21 Edwin L. Dale, Jr., "Are We Americans Going Soft," *New York Times Magazine*, Dec. 1, 1957, pp. 21, 120.
- 22 Helen H. Miller, "What America Can Afford," *New Republic*, March 7, 1960, pp. 15-23.
- 23 *Federal Reserve Bulletin*, September, 1958.
- 24 *The Affluent Society* (Boston: Houghton Mifflin, 1958), p. 253.
- 25 *Ibid.*, pp. 261, 328-333.
- 26 *Ibid.*, p. 274.
- 27 *The Human Condition* (Chicago: University of Chicago, 1958), pp. 126-127.
- 28 *Ibid.*, pp. 49, 134.
- 29 *Ibid.*, p. 322.
- 30 Leo Strauss, *What Is Political Philosophy* (Glencoe: Free Press, 1959), pp. 85-86.
- 31 Cf. James Bryce, "Why Great Men Are Not Chosen President," *The American Commonwealth* (New York: Macmillan, 1896, 1958), pp. 58-63.
- 32 Edwin S. Corwin, *The President: Office and Powers* (New York: New York University, 1940, 1956). Cf. Herman Finer, *The Presidency: Crisis and Regeneration* (Chicago: University of Chicago, 1960).
- 33 Plato, *Laws* (Cambridge: Harvard University, 1952), Book IX, 875, p. 271.
- 34 *An American Dilemma* (New York: Harper and Row, 1944, 1962). p. lxxi.
- 35 Eric Fromm, *The Sane Society* (New York: Rinehart, 1955), p. 8.
- 36 *Op. cit.* fn. 9 *supra*, pp. 6-7.
- 37 *New York Times*, Feb. 21, 1961, p. 22C.
- 38 *Ibid.*
- 39 *New York Times*, Feb. 7, 1962.
- 40 *Ibid.*
- 41 *Utilitarianism, Liberty, Representative Government* (New York: E. B. Dutton, Everyman Edition, 1950), p. 260.
- 42 *Medicine, A Report Prepared by the Center for the Study of Democratic Institutions* (Santa Barbara: Fund for the Republic, 1962), p. 4.
- 43 *Ibid.*, p. 5.
- 44 *The Mirage of Health* (New York: Harper, 1959), p. 181.
- 45 *New York Times*, July 1, 1962.
- 46 *New York Times*, December 3, 1962, p. 20C.
- 47 Dubos, *op. cit.*, p. 183.
- 48 *Medicine, op. cit.*, p. 26.
- 49 Dubos, *op. cit.*, p. 233.

- ⁵⁰ Strauss, *op. cit.* fn. 14 *supra*, p. 127.
⁵¹ *Ibid.*, p. 126; Arendt, *op. cit.*, p. 309.
⁵² C. Wright Mills, *The Power Elite* (New York: Oxford University, 1956).
⁵³ Fred J. Cook, *The Warfare State* (New York: Macmillan, 1962).
⁵⁴ *Ibid.*, p. 3.
⁵⁵ Plato (Jowett translation), *Republic* (New York: Modern Library, n.d.), II, 373 - 374, pp. 65 - 66.
⁵⁶ Strauss, *op. cit.* fn. 14 *supra*, pp. 7 - 8.
⁵⁷ Bernard Crick, "A Defense of Politics Against Technology," in *In Defense of Politics* (Chicago: University of Chicago, 1962).
⁵⁸ *Man's Emerging Mind* (Greenwich: Premier Books, 1957), p. 165.
⁵⁹ Teilhard de Chardin, *The Phenomenon of Man* (New York: Harper Torchbooks, 1961), pp. 226 - 227.
⁶⁰ Rene Dubos, *The Torch of Life* (New York: Simon and Schuster, 1962), p. 75.
⁶¹ John Herman Randall, Jr., *Aristotle* (New York: Columbia University, 1962), p. 167.
⁶² *The Two Faces of Federalism* (Santa Barbara: The Center for the Study of Democratic Institutions, 1961), p. 21.

A Discussion of: The Denial of Moral Politics

STANLIS: It seems to me, Professor Schutz, that you are using the terms, "public morality" or "moral politics," in the sense of identifying the legitimate subject matter, the definite domain of politics as such. But you haven't specified any general normative principles that would function and be a part, in practice, of the subject area that you discussed. Moral politics on the level of principle would not get into the specifics of subject matter, but would rather define the norms by which human behavior in society on the part of those in government would be judged and would perhaps be projected in determining valid as distinct from invalid means of performing public objectives. I wonder if you could say something about what you conceive to be the valid norms of public morality.

SCHUTZ: I would start with two negative norms which were cited in the paper. The first is individual freedom. There has to be a certain sphere of human action that is the individual's alone if he is to realize the individual part of his destiny. The second is the limited capability of government. Government cannot do everything even though some of it might theoretically be in the public realm. By becoming an all-encompassing agency it would subvert its limited purposes.

The positive norms are: first, those social actions which concern all of us to such an extent that unless we take a hand in them and their determination, and are allowed to participate in them and influence them, we cannot be considered free or moral men. Some of the major decisions of modern life may be beyond the influence or participation of individual men. If they are, and we still desire to be called free or moral, it seems to me that we are up against a contradiction.

A second positive norm is, of course, the political one. There are certain things that are, by their nature, within the realm of the public; these are political. "Political" means they must come under the direction and control of the most responsible elements in society. They must come under the direction and control of the *polis* because the *polis* is to society as the brain is to our body. It is that part of society which should lead or control. I would say that this is the rational norm. I don't specify any cases because I wish to leave to you what should come under it. I cite the obstacles to its application, however. The obstacle of mass society itself. The obstacle of equalitarianism, because everybody is conceived to have competence to do everything, and we are all believed to have the right to influence equally all the decisions of government. We, in effect, dilute the rational function of politics and prevent its full exercise. When you have what can be called an extreme egalitarian norm in democracy, it seems to me that you must restrict democracy because you have weakened the rational function of politics conceived as the guidance of society by its best elements.

STANLIS: I'd like to get back at one point there. You said that the norm is essentially rational. Is this rational element by which you determine the norm, is this intellectual or moral, would you say?

SCHUTZ: I would like to bow out now by saying it is right reason. It is moral and intellectual. As Socrates said, "Virtue is knowledge." It is the belief that intelligence is a dangerous thing without the moral impulse that actuates it or is behind it. Professor Strauss says in one of his books that without decent men who act upon the presuppositions of morality, intelligence can become a dangerous thing. This is my view of much of social science. The trained intelligence which denies moral man can corrode the social fabric.

MERSCHEL: It seems that your problem boils down to the fact that you haven't faced how this so-called economic system has allowed so many eggheads like ourselves to sit around talking about its flaws. It seems to me that you want to be a necessity rather than a luxury. Isn't it true that this economic system has allowed many more people to be, let's say, sitting about like the Athenians? We academic eggheads outnumber the Athenians ten to one. Take Plato's circle, for instance. This many people relieved from toil to sit around and talk would be unthinkable even in Athens. Don't you think you owe the system something?

SCHUTZ: I hope that I am fulfilling my debt to the system as I conceive it. I believe fully in the public morality of our national ideals. I believe so fully in them that I am constantly struck by the glaring contradiction between them and the current morality that stems from the economic sphere. My difficulties are that I am too patriotic, perhaps. Again I must refer to Professor Strauss. The fundamental

question of politics for the classics was the question of justice. It seems to me that even if you ask this question of our society, or have the answer to it, American society denies its relevance. That's my difficulty. I do not think I am being anti-American. I'm afraid that I am perhaps being idealistically American.

As to our sitting around talking, I would add something else. I think all of us sit around too much. I think talking is excellent, but too many of us do too much talking without any doing. And when thought becomes so divorced from action, we lose the wellsprings of our reality. Most of us political scientists can be second-rate Machiavellians because we don't act in politics. We do not live in a community where we can act in politics, where we can put the precepts we mouth in our American government courses into action. If we did, we would note that a great many people have moral concerns; that politics in many parts is an attempt to fulfill ideals; that there is much more to politics than personal aggrandizement. This does not contradict what I said in my lecture. Even though this impulse exists and constantly seeks to work itself out, the American political system is deeply biased against it. As I have said, I think it is the most inefficient and ineffective political system ever deliberately designed by man. And, if for a moment you will let your higher patriotism conquer your lower patriotism and go back to the Federalist Papers and the writings of our Founding Fathers, you will note that they meant the American political system to be inefficient and ineffective.

MERSCHER: You are playing, "Stop the world, I want to get off." I said before we began this discussion that I would tease you with one of Parkinson's laws, at least one of them which I interpret as follows: The minute we stop the economic, social, and political process in which we are involved here in America, then we are, to put it in slang, "dead." After all, Plato and Aristotle were operating after the great days of Athens. Is it an admission of decline that we suddenly say, "Oh! It's rotten." How would you handle this? Now I may sound a little bit like the National Association of Manufacturers, but I assure you it's intentional. This is deliberately taking the part of America as it is operating.

SCHUTZ: I'm not ready to get off the world. I was pointing to the deep contradiction in American political life between our ideals and the reality we live by. And I was pointing to what seems to me to be not only a contradiction between our thought and our action, but, furthermore, its consequences for our social system. It seems to me that there is another facet to it. Not only do we deny in practice our ideals and our highest national purposes; not only do we deny in practice the promise of democracy to fulfill us as moral beings; but also, by such a denial we weaken the social functioning of the human being. If you come to look upon our political ideals or prin-

ciples as ideology or sentiment, as something to oppose the Communists, or to capture the minds of men in the underdeveloped regions, and purely that, you come to operate at a level of hypocrisy that affects your very action. All of us are affected by this. The Negro problem is the most perfect example. We are taught from the very beginning the idea of equality, the ideal of the sovereignty of the law. And yet in daily practice we avoid it. We ourselves participate in the entire mess of it. We thus impugn our very morality. How does it affect us? Take a look at the statistics of the World Health Organization, our crime rate, our homicide rate, our suicide rate, our alcoholism, our resort to violence. I remember Ashley Montague saying that when he stepped into this country and saw policemen carrying guns, he was astounded, and he looked for the Indians. There are more murders committed in one of our major cities than in an entire country of Western Europe. Perhaps nothing can be done about it. I certainly am aware of the obstacles. But, I am pointing out what it has done to us; what it is doing to us. I am sick of the great American celebration. If we are to improve, if we are to progress toward our highest moral ideals, we at least have to be aware of them.

ZIMMERMAN: In defense of Dr. Schutz, and in offense of Professor Merschel and the National Association of Manufacturers and other flagwavers, let me make a few comments here. I think the real issue, and I have thought about this a long time, is not precisely our free enterprise system. I am not even sure what that is, given our corporate capitalism, our oligopolies, and so forth. The real issue is the whole problem of the industrial society. Professor Schutz brought out in his paper the destruction of community in the United States, and I would like to say that I doubt very much whether the majority of us here, or a majority of the audience, knows what a community is. I have had the good fortune to live outside of the United States in a community. The very fact that the community has been destroyed so effectively is, I would say, accounted for by the high mobility demanded by the industrial society. This is the really crucial problem. And when Schutz talks about legislation of public morality and the problem of politics, I wonder if there's anything we can really do, given the validity of his suggestion that this huge industrial society, which is growing and growing, will become more of a danger in the future than it is now. Granted that we still have freedom to sit around and talk like this; how much longer are we going to have such freedom? Given the trends that have been pointed out by William Whyte, by C. Wright Mills, or by Ortega y Gasset, if you want to start where it really was pointed out.

STRAUSS: What Dr. Zimmerman says goes to the root of the matter. I agree entirely with her description of our situation. But what can we do? The simplest, most practical, and least pretentious

way to understand the question is to ask oneself, "What can I do, placed where I am?" I, for instance, happen to be a teacher; I know that some of the members of the panel are also teachers; if I am not mistaken I see some actual and potential teachers in the audience too. As teachers we have to face the problem every day in the shape of the problem of quantity versus quality, of the problem of concentration versus distraction. Everyone of us can do something in this respect. Somehow, we all have the feeling that the teaching profession is not just one among millions; it occupies some higher, even a key position in the whole life of the nation.

That something has gone wrong in teaching in the last two generations is, I believe, admitted today by many people. Some people needed Sputnik to learn that something had gone wrong, but others did not. I think some change is now taking place in the State of Michigan, for example; also in other states. A profound change, especially in the teaching of the social sciences and the humanities, would affect a very large part of the whole citizen body of the next generation. This is something which, I believe, is more promising than legislation. This would be my general answer. One could, of course, also think of specific legislation; for example, some of the points which Professor Schutz raised so well about presidential elections generally being a popularity contest. One should consider whether there shouldn't be a constitutional amendment, or maybe an ordinary law, forbidding TV debates, because they obviously put a premium on one particular quality which is surely not identical with statesmanship.

The comparison of the two examples, which I gave, shows that I put a greater faith in what we can do in the field of education. In that field, no legislation is required, but rather a change of attitude on the part of faculties or administrations. In the first place, the abolition of the principle, "publish or perish"; no improvement, to speak of, can be expected as long as this principle remains in control. At present, the great question concerns the interpretation of the principle mentioned: Do we judge people by the number of their publications, or by numbers of pages in their publications? Or to take another example, a salutary change would be effected if political science departments in graduate schools would regard it as more important to train people who can teach well in college the principles of American government than to train men for research along "behavioralist" lines.

MERSCHEL: If we try to bring up natural law principles in teaching American government, we run into a kind of in-built traditional resistance of the American mind to any set of principles or abstract thought. And this is based upon, let us say, an empirical argument, a behavioral argument; namely, that all other systems were committed very heavily to ideology and are still so committed. We have done away with abstract thought, and it has worked. Now you

may say that on a low level this argument has to do with the assembly line which surrounds us in Detroit, while on a very high level it's very sophisticated. But I think that when you try to argue natural law principles there is what, I suppose, you could call the very dear and cherished laissez-faire theory of American government.

SCHUTZ: There is one thing I don't like in what Professor Merschel just said, and that is our belief that it has worked. We don't have to get to natural law or nature as a norm immediately. We can show where our system has not worked. This belief that we have achieved the ultimate in society, that we have created the new order of the world, is just happy-talk. It is what I meant by the great American celebration, as exemplified in Boorstin's *The Genius of American Politics*, or John Fischer's theory of the consensual majority. You believe that it has worked; it's just that your full bellies have prevented you from thinking, from opening your eyes. Your jumping in a car and roaring down the street to satisfy your sexual impulses have prevented you from looking out the windows of that car. If you believe that it has worked, you have merely lit one of those cigarettes which have been so aptly called "adult sugar-tits" and pacified yourself to the reality that goes on around you. If you think that our national ideals, our national purposes as they were phrased by our Founding Fathers worked, read them again and look around you. They haven't worked. The great American celebration is an ideology, a rationalization of what we have. In fact, many people believe that we are not moving any closer to it; we're moving further from it. A perfect example would be the school segregation cases. It took almost a hundred years for our political system to come around to doing what was proclaimed in the fever of war — to making a step toward the 14th Amendment and its equal protection of the laws clause. It should be pointed out that in 1954 this step was taken by the least political agency of our political system when it reversed its own precedent. That decision has been nullified in practice by the political part of our political system again and again. Furthermore, it engendered a great deal of violence. Now that we have ended legal segregation, what has happened? We have found a new way of segregating socially; we are abandoning the large cities to the Negro. We are now making them Negro ghettos. You can contribute this to social processes if you wish. But if you will look at the housing laws, FHA, Veteran's Housing, the mortgage requirements, credit regulations, and so many other things, you will see that there is a great deal of governmental policy in this. This is what Professor Merschel referred to as "it works."

RUTKOWSKI: Let me introduce briefly a somewhat different emphasis. The "celebration" of America may be something we might come to wring our hands over, but when has a nation not had an

inconsistency between its ideals and practices? Recall the struggle between the Socratic school and the Sophists. The Sophists were accused of destroying public virtue, of meretriciously teaching the skills of success in the city-state. But we also know that the Sophists were the prudent children of this world, and merely responded to actual civic conditions in which the superficial trappings of citizenship, rather than sacrificial dedication to the common good, were rewarded.

STRAUSS: As I see it, the American tradition is more than the European tradition, a tradition not, as some contemporaries say, of resistance to principles or contempt for principles, but, on the contrary, of affirming principles. It would be hard to find European parallels of equal standing to the Declaration of Independence or the Gettysburg Address. The issue would rather seem to be this: In the 19th century, everywhere in the West, not only in this country, people became so much assured of the fact of progress and the future of progress that they no longer felt a need to think about principles. The popular identification of good with progressive and bad with reactionary was a clear sign of this situation. It no longer seemed necessary to know the good or the just as such, but only the direction of the historical movement, something factual; for given the certainty of progress, the change was bound to be a change in the right direction. Now, in our age this has become questionable for the first time to the meanest capacities and, therefore, today no one can afford to be blind to the question of principles. So if there was a period of dormancy of thought about principles in the 19th century, this dormancy is no longer possible.

In a way this is admitted by behaviorist social science, for a distinction between fact and values implies that there can't be certainty regarding progress. This is not to deny, of course, that behaviorism goes even further than its 19th century predecessors in discrediting the question regarding principles, insofar as it asserts that all principles are subjective.

ZIMMERMAN: I would like to pursue further the problem which Professor Strauss has just raised about the behaviorists. In his paper, Professor Schutz made it very clear that he thought science, and I imagine he meant positivistic science, positivistic methodology in the social sciences particularly, is one of the greatest obstacles to creating morality in the public sphere or agreed moral principles. Professor Strauss has just finished making the comment that the behaviorists maintain — and they are in the large majority, or so we are told — that all of these moral principles and norms are largely subjective. Hence, each man to his own principles; nobody is right, and there can be no rational debate concerning this problem of morality because the problem of morality simply is irrational. I'd like to hear Professor Schutz say something more about this.

SCHUTZ: First, I wasn't concerned with positivistic social science. I think the one encouraging sign about positivistic social science is that it's so insignificant. The average citizen couldn't be concerned less. In fact, their invention of a language of their own has screened them off from most of the pernicious direct influence that they could have. Read a book in modern social science and you will realize that unless you know the language you're safe. I was concerned with modern science itself, not social science. Modern science acts upon certain premises or metaphysical assumptions that are completely counter to what would be a premise of moral politics. The major premise is the mechanistic model of science. Positivism again, if you wish. As Professor Strauss says in *Natural Right and History*, modern science is non-teleological. It does not act upon the basis of purpose and function in nature. Now Aristotle, as an example, did not presume a social science separate from natural science. Science, or the understanding of man, was a part of the understanding of nature. And the one fit the other.

In our time there's a double impact to this. First, you can't assume that man is teleological, that he has purpose or function which can serve as a standard for his political conduct or can serve as an ideal for the good society when science, as we accept it, denies purpose or function in all of nature. But there is more to it than that. Even if you could assume that man alone has purpose or function, the methods triumph over it because science provides us with so many benefits. The materialistic impact of science saps us intellectually. Thus, the things we come to respect or look upon as good have to have scientific authority behind them. So we are caught up in a vice in both directions. Ultimately we would have to come to some idea of purpose or function in nature, of man as a part of nature; to what one reviewer of de Chardin's *The Phenomenon of Man* calls "unified field theory." There have been some encouraging signs in this direction. Modern scientists, at least the avant-garde or the antiquarian moralists — depending upon how you are looking at it — are restoring ideas of purpose and function to some of their speculations. The modern physical scientists seem to be more aware of it than the social scientists. But that is not at all surprising. The social scientist is still trying to catch up with the physical scientist of two hundred years ago.

STANLIS: I would like to comment on some of the remarks just made. It seems to me that you are splitting the realm of science. In the first place, in the physical sciences empiricism and analytical reason are used pretty largely in theory in arriving at truth in nature. But as this applies to man, you have to work it finally through technology, through your economic system, before it begins to affect us as individuals or corporately within society. But I think the point that Professor Zimmerman made is still very valid; that actually, as it applies

to political morality, it is not physical science, but the attempt to carry the methods and the assumptions of the physical sciences into the social realms, that has resulted in some very serious problems that, I think, tend to make ethical norms in politics almost impossible. You can see this, perhaps, in fields other than politics even more clearly than in politics itself. The scientific descriptive scholarship in the humanities, for example, tends to reduce everything to linguistic patterns. The social engineering of behavioral psychology and sociology is in some ways a social manifestation of that. In legal philosophy, there is positivism, which erases all distinction between *de jure* and *de facto* law. And this tends, I think, so far as the legal basis of politics is to be determined, to make power an end in itself, with the whole structure of the law sanctioning political power. So that the application of the methods of the physical sciences to human affairs, and particularly to politics, does result in the denial of normative ethical principles by which to determine values and judge human behavior. It seems to me this is much more evident in the 20th century than the economic effects of the physical sciences, through economics, in productivity and technology. I think that the real problem is still the positivist, the behavioral psychologist and sociologist, as their theories apply to the problem of morality in politics.

The Crisis of Our Time

LEO STRAUSS

I am naturally moved by the kind remarks made about me, but I would only like to make one brief comment. I am not as gentle as my friends would like to present me; surely my enemies would agree with me on that point. To come nearer to my subject, the two lectures which I am supposed to give tonight and tomorrow are, in fact, a single lecture, the theme of which is the crisis of our time and the crisis of political philosophy. It would have been possible to draw the line between the two lectures at very different points, and perhaps I have not drawn it in the best way. So, I ask you for your forgiveness if this lecture is fragmentary; it is meant to be incomplete. The subject is more precisely, "the crisis of our time as a consequence of the crisis of political philosophy."

The crisis of our time, which is the point I want to develop, has its core in the doubt of what we can call "the Modern Project." That modern project was successful to a considerable extent. It has created a new kind of society, a kind of society that never was before. But the inadequacy of the modern project, which has now become a matter of general knowledge and of general concern, compels us to entertain the thought that this new kind of society, our kind of society, must be animated by a spirit other than that which has animated it from the beginning. Now this modern project was originated by modern political philosophy, by the kind of political philosophy which emerged in the 16th and 17th centuries. The end result of modern political philosophy is the disintegration of the very idea of political philosophy. For most political scientists today, political philosophy is not more than ideology or myth.

We have to think of the restoration of political philosophy. We have to go back to the point where the destruction of political phi-

losophy began, to the beginnings of modern political philosophy, when modern philosophy still had to fight against the older kind of political philosophy, classical political philosophy, the political philosophy originated by Socrates and elaborated above all by Aristotle. At that time, the quarrel of the ancients and the moderns took place, which is generally known only as a purely literary quarrel in France and in England, the most famous document in England being Swift's *Battle of the Books*. It was, in fact, not merely a literary quarrel. It was fundamentally a quarrel between modern philosophy, or science, and the older philosophy, or science. The quarrel was completed only with the work of Newton, which seemed to settle the issue entirely in favor of the moderns. Our task is to reawaken that quarrel, now that the modern answer has been given the opportunity to reveal its virtues and to do its worst to the old answer for more than three centuries. In order to carry conviction, I must remain as close as possible to what is today generally accepted in the West. I cannot start from premises which today are agreed upon only by a fairly small minority. In other words, I have to argue to a considerable extent *ad hominem*. I hope this will not create a misunderstanding.

To avoid another kind of misunderstanding, I shall first give a sketch of tonight's lecture. The crisis of the West has been called the decline of the West, in the sense of the final decline of men. This view is not tenable, but one cannot deny that a decline, that some decline, of the West has taken place. The West has declined in power most obviously; its very survival is now threatened. This decline, however, does not constitute the crisis of the West. The crisis of the West consists in the fact that the West has become uncertain of its purpose. This purpose was the universal society, a society consisting of equal nations, each consisting of free and equal men and women, with all these nations to be fully developed as regards their power of production, thanks to science. Science to be understood as essentially in the service of human power, for the relief of man's estate. Science would bring about universal affluence. A state in which no one would have any longer any motive for encroaching on other men or on other nations. Universal affluence would lead to the universal and perfectly just society, as a perfectly happy society.

Many Western men have become doubtful of this project by the self-revelation of Communism as immensely powerful and as radically antagonistic to the Western notion of how this universal and just society should be established and managed. The antagonism between the West and Communism leads to the consequence that no possibility of a universal society exists in the foreseeable future. Political society remains for the foreseeable future what it always has been, particular society, society with frontiers, a closed society, concerned with self-improvement. This experience which we have had requires,

however, not only a political reorientation, but also a reorientation of our thoughts regarding principles.

I mention here three points. First, is this particularism, or differently stated, this patriotism, not in itself better than universalism or globalism? Second, is it reasonable to expect justice and happiness as a necessary consequence of affluence? Is affluence even a necessary, although not a sufficient, condition of virtue and happiness? Is there not some truth in the notion of voluntary poverty? Is even involuntary poverty an insurmountable obstacle to virtue and happiness? And third, is the belief that science is essentially in the service of human power not a delusion, and even a degrading delusion? Now, let me begin.

The assertion that we are in the grip of a crisis is hardly in need of proof. Every day's newspapers tell us of another crisis, and all these little daily crises can easily be seen to be parts, or ingredients, of the one great crisis, the crisis of our time. The core of that crisis, I submit, consists in the fact that what was originally a political philosophy has turned into an ideology. That crisis was diagnosed at the end of World War I by Spengler as a going down or decline of the West. Spengler understood by the West one culture among a small number of high cultures. But the West was for him more than one high culture among a number of them. It was for him the comprehensive culture, the only culture which had conquered the earth. Above all, it was the only culture which was open to all cultures, which did not reject the other cultures as forms of barbarism, or tolerate them condescendingly as underdeveloped. It is the only culture which has acquired full consciousness of culture as such. Whereas culture originally meant the culture of the human mind, the derivative and modern notion of culture necessarily implies that there is a variety of equally high cultures. But, precisely since the West is the culture in which culture reaches full self-consciousness, it is the final culture; the owl of Minerva begins its flight in the dusk. The decline of the West is identical with the exhaustion of the very possibility of high culture. The highest possibilities of man are exhausted. But men's highest possibilities cannot be exhausted as long as there are still high human tasks, as long as the fundamental riddles which confront man have not been solved to the extent to which they can be solved. We may, therefore, say — appealing to the authority of science in our age — that Spengler's analysis and prediction is wrong. Our highest authority, natural science, considers itself susceptible of infinite progress. And this claim does not make sense, it seems, if the fundamental riddles are solved. If science is susceptible of infinite progress, there cannot be a meaningful end or completion of history. There can only be a brutal stopping of man's onward march through natural forces acting by themselves or directed by human brains and hands.

However this may be, in one sense Spengler has proved to be

right. Some decline of the West has taken place before our eyes. In 1913, the West — in fact, this country together with Great Britain and Germany — could have laid down the law for the rest of the earth without firing a shot. For at least a half century, the West controlled the whole globe with ease. Today, so far from ruling the globe, the West's very survival is endangered by the East, as it has not been since the beginning. From the *Communist Manifesto*, it would appear that the victory of Communism would be the complete victory of the West, of the synthesis which transcends the national boundaries of British industry, French revolution, and German philosophy, or with the East. We see that the victory of Communism would, indeed, mean the victory of originally Western natural science, but, at the same time, the victory of the most extreme form of Eastern despotism. However much the power of the West may have declined, however great the dangers to the West may be, that decline, that danger — nay, the defeat and the destruction of the West — would not necessarily prove that the West is in a crisis. The West could go down in honor, certain of its purpose.

The crisis of the West consists in the West having become uncertain of its purpose. The West was once certain of its purpose, of a purpose in which all men could be united. Hence, it had a clear vision of its future as the future of mankind. We no longer have that certainty and that clarity. Some of us even despair of the future. This despair explains many forms of contemporary Western degradation. This is not meant to imply that no society can be healthy unless it is dedicated to a universal purpose, to a purpose in which all men can be united. A society may be tribal and yet healthy. But a society which was accustomed to understand itself in terms of a universal purpose cannot lose faith in that purpose without becoming completely bewildered. We find such a universal purpose expressly stated in our immediate past; for instance, in famous official declarations made during the two world wars. These declarations merely restate the purpose stated originally by the most successful form of modern political philosophy: a kind of that political philosophy which aspired to build on the foundation laid by classical political philosophy, but in opposition to the structure erected by classical political philosophy, a society superior in truth and justice to the society toward which the classics aspired.

According to that modern project, philosophy or science was no longer to be understood as essentially contemplative, but as active. It was to be in the service of the relief of man's estate, to use Bacon's beautiful phrase. It was to be cultivated for the sake of human power. It was to enable man to become the master and the owner of nature through the intellectual conquest of nature. Philosophy or science, which was originally the same thing, should make possible progress toward an ever greater prosperity. Thus, everyone would share in all

the advantages of society or life, and therewith make true the full meaning of the natural right of everyone to comfortable self-preservation (Locke's phrase) and all that that right entails, and the natural right of everyone to develop all his faculties fully, in concert with everyone else's doing the same. The progress toward an ever greater prosperity would thus become, or render possible, progress toward an ever greater freedom and justice. This progress would necessarily be progress toward a society embracing equally all human beings, a universal league of free and equal nations, each nation consisting of free and equal men and women. For it had come to be believed that the prosperous, free, and just society in a single country, or in a few countries, is not possible in the long run. To make the world safe for the Western democracies, one must make the whole globe democratic, each country in itself, as well as the society of nations. Good order in one country, it was thought, presupposes good order in all countries and among all countries. The movement toward the universal society, or the universal state, was thought to be guaranteed not only by the rationality, the universal validity of the goal, but also because the movement toward that goal seemed to be the movement of the large majority of men, on behalf of the large majority of men. Only those small groups of men, who hold in thrall many millions of their fellow human beings and who defend their own antiquated interests, resist that movement.

This view of the human situation in general, and of the situation in our century in particular, retained a certain plausibility not in spite of fascism, but because of it, until Communism revealed itself even to the meanest capacities as Stalinism and post-Stalinism; for Trotskyism, being a flag without an army, and even without a general, was condemned or refuted by its own principle. For some time, it appeared to many teachable Westerners — to say nothing of the unteachable ones — that Communism was only a parallel movement to the Western movement; as it were, a somewhat impatient, wild, wayward twin who was bound to become mature, patient, and gentle. But, except when in mortal danger, Communism responded to fraternal greetings with contempt or, at most, with manifestly dissembled signs of friendship, and when in mortal danger it was as eager to receive Western help as it was determined to give no word of thanks in return. It was impossible for the Western movement to understand Communism as merely a new version of that external reaction against which it had been fighting for centuries. It had to admit that the Western project, which in its way had made provision against all earlier forms of evil, could not provide against the new form in speech or in deed. For some time, it seemed sufficient to say that while the Western movement agrees with Communism regarding the goal of the universal prosperous society of free and equal men and women, it disagrees with it regarding the means. For Communism, the end,

the common good of the whole human race being the most sacred thing, justifies any means. Whatever contributes to the achievement of the most sacred end partakes of its sacredness and is, therefore, itself sacred. Whatever hinders the achievement of that end is devilish. The murder of Lumumba was described by a Communist as a reprehensible murder, by which he implied that there can be irreprehensible murders, I suppose like the murder of Nagy.

It came to be seen, then, that there is not only a difference of degree, but of kind, between the Western movement and Communism. And this difference was seen to concern morality, the choice of means. In other words, it became clearer than it had been for some time that no bloody or unbloody change of society can eradicate the evil in man. As long as there are men, there will be malice, envy, and hatred; hence, there cannot be a society which does not have to employ coercive restraints. For the same reason, it could no longer be denied that Communism will remain as long as it lasts in fact and not merely in name: the iron rule of a tyrant which is mitigated or aggravated by its fear of palace revolutions. The only restraint in which the West can put some confidence is the tyrant's fear of the West's immense military power.

The experience of Communism has provided the Western movement with a twofold lesson: a political lesson, a lesson regarding what to expect and what to do in the foreseeable future, and a lesson regarding the principle of politics. For the foreseeable future, there cannot be a universal state, unitary or federative. Apart from the fact that there does not exist now a universal federation of nations, but only one of those nations which are called peace-loving, the federation that does exist masks the fundamental cleavage. If that federation is taken too seriously, as a milestone of man's onward march toward the perfect and, hence, universal society, one is bound to take great risks, supported by nothing but an inherited and perhaps antiquated hope, and thus endanger the very progress one endeavors to bring about. It is imaginable that in the face of the danger of thermonuclear destruction, a federation of nations, however incomplete, would outlaw wars. That is to say, wars of aggression. But this means that it acts on the assumption that all present boundaries are just, in accordance with the self-determination of nations. This assumption is a pious fraud, the fraudulence of which is more evident than its piety. In fact, the only changes of the present boundaries which are provided for are those not disagreeable to the Communists. One must also not forget the glaring disproportion between the legal equality and the factual inequality of the confederates. This factual inequality is recognized in the expression, "underdeveloped nations," an expression, I have been told, coined by Stalin. The expression implies the resolve to develop them fully. That is to say, to make them either Communist or Western. And this despite the fact that

the West claims to stand for cultural pluralism. Even if one could still contend that the Western purpose is as universal as the Communist, one must rest satisfied for the foreseeable future with a practical particularism. The situation resembles the one, as has often been said, which existed during those centuries when both Christianity and Islam each raised its claim, but each had to be satisfied with uneasily co-existing with its antagonist. All this amounts to saying that for the foreseeable future political society remains what it always has been: a partial or particular society whose most urgent and primary task is its self-preservation and whose highest task is its self-improvement. As for the meaning of self-improvement, we may observe that the same experience which has made the West doubtful of the viability of a world society has made it doubtful of the belief that affluence is a sufficient and even necessary condition of happiness and justice. Affluence does not cure the deepest evils.

I must say a few words about another ingredient of the modern project, and this needs a somewhat more detailed discussion. Very briefly, we can say that the modern project was distinguished from the earlier view by the fact that it implied that the improvement of society depends decisively on institutions, political or economic, as distinguished from the formation of character. An implication of this view was the simple separation — as distinguished from a distinction — of law from morality. Beyond positive law, there is a sphere of enlightenment indeed; that is to say, of a purely theoretical education as distinguished from moral education or formation of character. We may illustrate this by the example of one of the heroes of that modern project, by the example of Hobbes. Hobbes was, of course, not a simple absolutist who was charmed by Nero and such people. Hobbes wanted to have enlightened absolute sovereigns, "enlightened despots," as they came to be called. But his whole construction was of such a kind that he guaranteed only the possibility and necessity of despotism. The enlightened character of the despot remained a mere matter of hope.

Now this situation is repeated in a different way in the development of modern liberal democracy. Liberal democracy claims to be responsible government, a political order in which the government is responsible to the governed. The governed, of course, also have some responsibility to the government; the governed are supposed to obey the laws. But the key point is this: in order to be responsible, the government must have no secrets from the governed. "Open covenants openly arrived at" — the famous formula of President Wilson expresses this thought most clearly. Of course, liberal democracy also means limited government, the distinction between the public and the private. Not only must the private sphere be protected by the law, but it must also be understood to be impervious to the law. The laws must protect the sphere in which everyone may act and think as he pleases, in which he may be as arbitrary and prejudiced as he likes. "My home is my

castle." But this is not simply true. My home is not simply my castle; it may be entered with a search warrant. The true place of secrecy is not the home but the voting booth. We can say the voting booth is the home of homes, the seat of sovereignty, the seat of secrecy. The sovereign consists of the individuals who are in no way responsible, who can in no way be held responsible: the irresponsible individual. This was not simply the original notion of liberal democracy. The original notion was that this sovereign individual was a conscientious individual, the individual limited and guided by his conscience.

It is perfectly clear that the conscientious individual creates the same difficulty as Hobbes' enlightened despot. You cannot give a legal definition of what constitutes the conscientious individual. You cannot limit voting rights to conscientious people as you can limit voting rights by property qualifications, literacy tests, and the like. Conscientiousness can only be fostered by non-legal means, by moral education. For this no proper provision is made, and the change in this respect is well known to all of you. This change which has taken place and is still taking place may be called the decline of liberal democracy into permissive egalitarianism. Whereas the core of liberal democracy is the conscientious individual, the core of permissive egalitarianism is the individual with his urges. We only have to take the case of the conscientious objector; whatever you may think of conscientious objectors, there is no doubt that they are people who are perfectly willing to lay down their lives for something which they regard as right. The man who wants to indulge his urges does not have the slightest intention to sacrifice his life, and hence also his urges, to the satisfaction of his urges. This is the moral decline which has taken place.

Let me illustrate this great change by another example. I have spoken at the beginning of this lecture of the concept of culture. In its original meaning, it meant *the* culture of the human mind. By virtue of a change which took place in the 19th century, it became possible to speak of culture in the plural (the cultures). What has been done on a grand scale, especially by Spengler, has been repeated on a somewhat lower level, but with at least as great effect, by such anthropologists as Ruth Benedict. What, then, does culture mean today? In anthropology and in certain parts of sociology the word, "culture," is, of course, always used in the plural, and in such a way that you have a culture of suburbia, a culture of juvenile gangs, non-delinquent and even delinquent. And you can say, according to this recent notion of culture, there is not a single human being who is not cultured because he belongs to a culture. At the same time, fortunately, the older notion is still maintained; when I made this remark some of you laughed, because when we speak of a cultured human being we still imply that not all human beings are cultured or possess culture. Looking forward to the end of the road, one can say that according

to the view now prevailing in the social sciences every human being who is not an inmate of a lunatic asylum is a cultured human being. At the frontiers of research, of which we hear so much today, we find the interesting question whether the inmates of lunatic asylums also do not have a culture of their own.

Let me now return to my argument. The doubt of the modern project, which is today quite widespread, is not merely a strong but vague feeling. It has acquired the status of scientific exactitude. One may wonder whether there is a single social scientist left who would assert that the universal and prosperous society constitutes the rational solution of the human problem. For present-day social science admits and even proclaims its inability to validate any value judgments proper. The teaching originated by modern political philosophy, those heroes of the 17th century, in favor of the universal and prosperous society has admittedly become an ideology. That is to say, a teaching not superior in truth and justice to any other among the innumerable ideologies. Social science which studies all ideologies is itself free from all ideological biases. Through this Olympian freedom it overcomes the crisis of our time. That crisis may destroy the conditions of social science; it cannot affect the validity of its findings. Social science has not always been as skeptical or as restrained as it has become during the last two generations. The change in the character of social science is not unconnected with the change in the status of the modern project. The modern project was originated by philosophers, and it was originated as something required by nature, by natural rights. The project was meant to satisfy, in the most perfect manner, the most powerful and natural needs of men. Nature was to be conquered for the sake of man, who was supposed to possess a nature, an unchangeable nature. The originators of the project took it for granted that philosophy and science are identical. After some time, it appeared that the conquest of nature requires the conquest of human nature too and, in the first place, the questioning of the unchangeability of human nature. After all, an unchangeable human nature might set absolute limits to progress. Accordingly, the natural needs of men could no longer direct the conquest of nature. The direction had to come from reason as distinguished from nature, from the rational "Ought" as distinguished from the neutral "Is." Thus, philosophy, logic, ethics, aesthetics, as the study of the "Ought" or the norms, became separated from science as the study of the "Is." While the study of the "Is," or science, succeeded ever more in increasing man's power, the ensuing discredit of reason precluded distinction between the wise, or right, and the foolish, or wrong, use of power. Science, separated from philosophy, cannot teach wisdom. There are still some people who believe that this predicament will disappear as soon as social science and psychology have caught up with physics and chemistry. This belief is wholly unreasonable. For social science and

psychology, however perfected, being sciences, can only bring about a still further increase of man's power. They will enable man to manipulate men still better than ever before. They will as little teach man how to use his power over men or non-men as physics and chemistry do. The people who indulge this hope have not grasped the bearing of the distinction between facts and values, which they preach all the time. This is, indeed, the core of modern science, of modern social science as it has finally developed in the last two generations: the distinction between facts and values, with the understanding that no distinction between good or bad values is rationally possible. Any end is as defensible as any other. From the point of view of reason, all values are equal. The task with which academic teachers in the social sciences are concerned is primarily to face this issue posed by the fact-value distinction. I believe that one can show that this fundamental premise of the present-day social sciences is untenable, and that one can show it on a variety of grounds. But I am now concerned with a somewhat broader issue.

When we reflect on the fact-value distinction, we see one element of it which is quite striking. The citizen does not make the fact-value distinction. He is as sure that he can reasonably distinguish between good and bad, just and unjust, as he can distinguish between true and false, or as he can judge so-called factual statements. The distinction between facts and values is alien to the citizen's understanding of political things. The distinction between facts and values becomes necessary, it seems, only when the citizen's understanding of political things is replaced by the specifically scientific understanding. The scientific understanding implies, then, a break with the pre-scientific understanding. Yet, at the same time, it remains dependent on the pre-scientific understanding. I may illustrate this by a most simple example. If someone is sent out by a sociology department to interview people, he is taught all kinds of things; he is given very detailed instructions. But one thing he is not told: address your questions to people, to human beings, and not to dogs, trees, cats, and so on. Furthermore, he is not even told how to tell human beings from dogs. This knowledge is presupposed. It is never changed, never refined, never affected by anything he learns in social science classes. This is only the most massive example of how much allegedly self-sufficient scientific knowledge presupposes of "a priori" knowledge, of pre-scientific knowledge which is not questioned for one moment in the whole process of science. Now, regardless of whether the superiority of the scientific understanding to the pre-scientific understanding can be demonstrated or not, the scientific understanding is surely secondary or derivative. Hence, social science cannot reach clarity about its doings if it does not dispose of a coherent and comprehensive understanding of what one may call the common sense understanding of political things which precedes all scientific under-

standing; in other words, if we do not primarily understand political things as they are experienced by the citizen or statesman. Only if it disposes of such a coherent and comprehensive understanding of its basis or matrix can it possibly show the legitimacy and make intelligible the character of that peculiar modification of the primary understanding of political things which is the scientific understanding. This, I believe, is an evident necessity if social science or political science is to be or to become a rational enterprise. . . . Being a modification of the primary understanding of political things, it must be understood as such a modification. We must understand the pre-scientific, the common sense understanding, the citizen's understanding of political things before we can truly understand what the modification effected by scientific understanding means.

But how can we get that understanding? How can our poor powers be sufficient for an elaboration of the pre-scientific primary citizens' understanding of political things? Fortunately for us, this terrific burden, the most basic work which can be done and must be done in order to make political science and, therefore, also the other social sciences truly sciences, rational enterprises, has been done. As in a way every one of you knows, it has been done by Aristotle in his *Politics*. That work supplies us with the classic and unforgettable analysis of the primary understanding of political phenomena.

This assertion is exposed to a very great variety of seemingly devastating objections. I shall devote tomorrow's political lecture to a presentation of what this enterprise, Aristotelian political science, means. I would like to devote the rest of this lecture to a strict *ad hominem* argument in order to lead, as it were, the now preponderant part in the profession, the so-called behavioralists, if they are willing to listen to an argument, to a somewhat better understanding of what they would do if they were well advised. When you look around yourself, not at the University of Detroit, not at other Catholic institutions, but at non-Catholic institutions, I think you can say that with very few exceptions political philosophy has disappeared. Political philosophy, the decay of political philosophy into ideology, reveals itself today most obviously in the fact that in both research and teaching political philosophy has been replaced by the history of political philosophy. Many of you have read or used the famous work by Sabine, and you only have to read the preface of Sabine to see that what I am going to say is simply correct. Now, what does this substitution of the history of political philosophy for political philosophy mean? It is, strictly speaking, absurd to replace political philosophy by the history of political philosophy. It means to replace a doctrine which claims to be true by a survey of errors, and that is exactly what Sabine, for example, does. So, political philosophy cannot be replaced by the history of political philosophy.

The discipline which takes the place of political philosophy is the one which shows the impossibility of political philosophy, and that discipline is, of course, logic. What, for the time being, is still tolerated under the name, "history of political philosophy," will find its place within a rational scheme of research and teaching in footnotes to the chapters in logic textbooks which deal with the distinction between factual judgments and value judgments. These footnotes will supply slow learners with examples of the faulty transition by which political philosophy stands or falls, from factual judgments to value judgments. They will give examples from Plato, Aristotle, Locke, Hume, or Rousseau and will show when and where these famous men committed a blunder which every ten-year-old child now knows how to avoid. Yet, it would be wrong to believe that in the new dispensation, according to the demands of logical positivism or behavioral science, the place once occupied by political philosophy is filled entirely by logic, however enlarged. A considerable part of the matter formerly treated by political philosophy is now treated by non-philosophic political science, which forms part of social science. This new political science is concerned with discovering laws of political behavior and, ultimately, universal laws of political behavior. Lest it mistake the peculiarities of the politics of the times and the places in which social science is at home for the character of all politics, it must study also the politics of other climes and other ages. The new political science thus becomes dependent upon a kind of study which belongs to the comprehensive enterprise called universal history. Now, it is controversial whether history can be modeled on the natural sciences or not, and, therefore, whether the aspiration of the new political science to become scientific in the sense of the natural sciences is sound.

At any rate, the historical studies in which the new political science must engage must become concerned not only with the workings of institutions, but with the ideologies informing these institutions as well. Within the context of these studies, the meaning of an ideology is primarily the meaning in which its adherents understand it. In some cases, the ideologies are known to have been originated by outstanding men. In these cases, it becomes necessary to consider whether and how the ideology as conceived by the originator was modified by its adherents. For, precisely, if only the crude understanding of ideologies can be politically effective, it is necessary to grasp the characteristics of crude understanding. If what they call the routinization of charisma is a permitted theme, the vulgarization of thought ought to be a permitted theme also. One kind of ideology consists of the teachings of the political philosophers. These teachings may have played only a minor political role, but one cannot know this before one knows these doctrines solidly. This solid knowledge consists primarily in understanding the teachings of the political philosophers as they themselves meant them. Surely, every one of them was mistaken in be-

lieving that his teaching was a sound teaching regarding political things. Through a reliable tradition we know that this belief forms part of a rationalization, but the process of rationalization is not so thoroughly understood that it would not be worthwhile to study it in the case of the greatest minds. For all we know, there may be various kinds of rationalizations, etc., etc. It is, then, necessary to study the political philosophies, not only as they were understood by their originators, in contradistinction to the way in which they were understood by their adherents and various kinds of their adherents, but also by their adversaries and even by detached or indifferent bystanders or historians. For indifference does not offer a sufficient guarantee against the danger that one identifies the view of the originator with a compromise between the views of his adherents and those of his adversaries. The general understanding of the political philosophies which is then absolutely necessary on the basis of behavioral political science may be said to have been rendered possible today by the shaking of all traditions; the crisis of our time may have the accidental advantage of enabling us to understand in an untraditional, a fresh, manner what was hitherto understood only in a traditional, derivative manner.

Social science, then, will not live up to its claim if it does not concern itself with the genuine understanding of the political philosophies proper, and therewith, primarily because it comes first, of classical political philosophy. As I indicated, such an understanding cannot be presumed to be available. It is sometimes asserted today that such an understanding is not even possible because all historical understanding is relative to the point of view of the historian, his country, his time. The historian cannot understand, it is said, the teaching as it was meant by its originator, but he necessarily understands it differently than its originator understood it. Ordinarily, the historian's understanding is inferior to the originator's understanding. In the best case, the understanding will be a creative transformation of the original teaching. Yet, it is hard to see how one can speak of the creative transformation of the original teaching if it is not possible to grasp the original teaching as such.

Be this as it may, the following point seems to be of crucial importance. To the extent to which the social scientist succeeds in this kind of study, which is required of him by the demands of his own science, he not only enlarges the horizon of present-day social science; he even transcends the limitations of that social science. For he learns to look at things in a manner which is, as it were, forbidden to the social scientist. He will have learned from his logic that his science rests on certain hypotheses, certainties, or assumptions. He learns now to suspend these assumptions because, as long as he maintains them, he has no access to his subject matter. He is thus compelled to make the assumptions of social science his theme. Far from being merely one of the innumerable themes of social science, history of political

philosophy, and not logic, proves to be the pursuit concerned with the presuppositions of social science. These presuppositions prove to be modifications of the principles of modern political philosophy, which, in their turn, prove to be modifications of the principles of classical political philosophy. To the extent to which a behavioral political scientist takes his science and its requirements seriously, he is compelled to engage in such a study, in such a historical study of his own discipline, and he cannot conduct that study without questioning the dogmatic premises of his own science. Therewith, his horizon is enlarged. He must at least consider the possibility that the older political science was sounder and truer than what is regarded as political science today.

Such a return to classical political philosophy is both necessary and tentative or experimental. Not in spite, but because it is tentative, it must be carried out seriously; that is to say, without squinting at our present-day predicament. There is no danger that we can ever become oblivious of this predicament, since that predicament is the incentive to our whole concern with the classics. We cannot reasonably expect that a fresh understanding of classical political philosophy will supply us with recipes for today's use. The relative success of modern political philosophy has brought into being a kind of society wholly unknown to the classics, a kind of society in which the classical principles as stated and elaborated by the classics are not immediately applicable. Only we living today can possibly find a solution to the problems of today. An adequate understanding of the principles, as elaborated by the classics, may be the indispensable starting point for an adequate analysis, to be achieved by us, of present-day society in its peculiar character, and for the wise application, to be achieved by us, of these principles to our tasks.

Jurisprudence Today: Naturalism vs. Positivism

ANTON DONOSO

It has been observed that "... the present era is one of crisis and confusion in law; but this may be saying no more than that it is the present era."¹ Beyond a doubt this confusion in legal theory is one of the causes of the political crisis in our times.² The conflict in law is, of course, a reflection of disagreements that are rooted more deeply; such as a criterion of values, the nature of man, and the structure of reality itself. In other words, contemporary philosophy of law reflects the lack of agreement in contemporary general philosophy.

Today, more than at any other time, philosophy is being pursued as an individual enterprise. If philosophers seem to belong to any one school, it is probably *anarchism*. One might be tempted to comment that philosophy has *disintegrated*, but it must be remembered that it was never truly *integrated*. If jurisprudence had to wait for a resolution of differences on the levels of the philosophies of being, of man, and of values so that some order might be introduced into its own area, it is my considered opinion that such never would be realized.

Fortunately, agreement in such areas as the philosophies of science, of history, of law, etc., is much less difficult than agreement concerning the absolute ultimates, the acknowledged sphere of metaphysics. The reason should be clear: the philosophic examination that is jurisprudence begins with a given legal technique and system of existing laws so that there is less chance of utilizing solely *a priori* procedures. If the philosopher of law overlooks the necessity of examining his material by means of a continual reference to realities as they actually are lived, the resulting consequences are manifested as invalid more quickly

to him than to the metaphysician who has overlooked this same necessity.

The following examination will be devoted mainly to an exposition of current positions in jurisprudence which I understand as the sum total of organized reflections on the nature of law and its relationship to other learned endeavors. Because of the great complexity of the contemporary scene the survey will be limited to the Anglo-American world.³ The few "observations" made at the end of this paper are not meant to constitute my position on the introduction of agreement into contemporary legal theories. That task is beyond me. Rather, these thoughts represent observations made by myself as an historian of contemporary thought and are offered with the hope that legal philosophers will recognize their agreements as well as see their differences more clearly, much the easier to eliminate them.

The mid-century years saw much activity in the field of jurisprudence as part of a trend, in the wake of the chaos created by the Second World War, to look anew at the political structures and aspirations of mankind. This, of necessity, included a re-examination of the laws by which such structures and aspirations are realized.⁴

As throughout the past century, contemporary legal theories can be divided into varieties of legal positivism and natural or "higher" law theories. A survey of the writings in jurisprudence since the war's end, especially in the United States, reveals that legal philosophers are a bit wary with those legal positions that can be characterized, at best, by saying that they are *more* "positivistic" — that basically law is what is said to be (posited as) law and has the force behind it to be considered such. The trend is clearly toward what can be characterized, at best, by saying that it is *more* "naturalistic" — that positive law is to be guided in its formulation and judged as to its validity by "ideals" founded on the "condition" and operation of the human person.⁵

Needless to say, this is an oversimplification of the actual picture. Upon closer examination we find that there are a number of "attitudes" toward law, some of which exhibit characteristics which are both positivistic and naturalistic. If I may apply to contemporary jurisprudence the political schemata of positions that are termed "left," "right," and "center," the field of legal theory may be said to show the following positions from left to center to right: analytical jurisprudence — pure theory of law — legal realism — sociological jurisprudence — legal idealism — traditional natural law theories.

At a moment such as this I feel deeply the significance of the dictum: "to classify is as difficult as it is unrewarding." Such a classification is difficult because some artificiality has to be introduced with oversimplification resulting. It is unrewarding because anyone familiar with the field easily can detect these oversimplifications. But we

might add that to classify is also necessary — if only to undertake a brief survey such as the following.

The customary manner in which the word “positivism” is defined in relation to legal theory is to say that it is a position whose primary aim is to study law as it is, not law as it originated in the past, nor as it ought to be in the future. John Austin, often called the “founder” of this approach, proclaims its program thusly: “the matter of jurisprudence is positive law.”⁶

The important point is that law deals with what is, referred to as “positive law,” and not with what ought to be, referred to as “ideal” or “natural law.” Because of the omission of the “ideal” element in law the legal positivists are accused of separating law from morals.⁷ Their concern is said to center on an examination of the nature of authoritative legal materials. As a result, they define law as the command of the sovereign under threat of sanction, expressed in political institutions and governmental agencies, particularly the legislature and the courts.

The manifestation of positivism called “analytical jurisprudence” has taken up the task of clarifying legal terms and conceptions in order to eliminate as much of the ambiguity lurking in them as possible. With these disposed ambiguities go the contradictions generated by unclarity. To make law consistent with itself can be called the chief function of this type of positivism.⁸ Such an approach to law is characteristic of present-day English jurisprudence. To date it has made little headway in the United States, although as a general philosophy the “analytical” approach is probably the most influential in our country.⁹

Another manifestation of the contemporary positivistic approach is the “pure theory of law” of Hans Kelsen. He re-echoes the program of Austin when he states that “the pure theory of law is a theory of positive law.”¹⁰ First of all, this is a theory of man-made law rather than transcendental law, a theory “pure” or free of ethics and politics.¹¹ As such it is applicable to any given system of law in any given political structure. What is called “law” applies solely to those norms that have been “validly” incorporated into law, regardless of what their “worth” might be said to be.¹²

To acknowledge the validity of a legal norm is to recognize the sovereign who has the power to validate norms. Whereas Austin’s approach to the means of determining the sovereign is said to be blurred by vague reference, Kelsen is said to have resolved this. Note the following:

. . . It is not Austin’s “sovereign” to whom we must look, however, but rather to the legal norm. If, for instance, a city police chief promulgates a new traffic rule, this rule is valid only if the legal order, such as a regulation of the state highway commissioner, authorized it; and the commissioner’s regulation must likewise be grounded in law, *e.g.*, a statute authorizing him to issue regulations. The law-making power

of the legislature derives from the state's constitution, which in turn may be based on an older constitution. The original state constitution was again authorized by higher law, in our case the federal constitution, which authorizes the states to make law in those fields not reserved to the federal government.¹³

Thus, the legality of any norm, in any country whatsoever, depends upon whether it is grounded in a more basic norm. And this ultimately basic norm can be said to be a revolutionary act; *e.g.*, the Declaration of Independence for the United States. Such an act is basic precisely because it cannot be derived from a superior norm; and it itself is a norm-creating event.¹⁴ However, we may go a step further: successful conquests and revolutions are norm-creating events because international law so recognizes them.¹⁵

Such international law is based on customary law, whose basic norm might be stated as follows: "States ought to behave as they have customarily behaved."¹⁶ Kelsen refuses to ground this customary law on natural law, maintaining that there exists merely an external similarity between the theory of the basic norm which applies to positive law only, and the natural law doctrine.¹⁷ The pure theory of law inquires merely as to the *formal* validity of a legal system regardless of the validity of its contents. Any natural law theory erroneously seeks to do both.

Despite the presence of Kelsen in this country and his continuous writing, his theory has had little influence in the United States. He has a significant following in Latin America (in connection with certain ideas of the phenomenological movement) as well as in Japan and in Europe.¹⁸

Our next consideration takes us to positions that are "center" and slightly "left" of center. These are sociological jurisprudence and legal realism, respectively. Before discussing the positions as they are today, it is helpful to recall that of the two, sociological jurisprudence is prior historically and that legal realism emerged from it almost as a "reform" movement. In so far as both are positivistic, they cannot be understood apart from the general movement in methodology called "pragmatism." The names of James, Holmes, and Dewey stand out in this pragmatic attitude, a new name for an old way of thinking, a way of thinking that considers consequences and facts rather than fixed, *a priori* principles.

Roscoe Pound was the main figure¹⁹ in the turn of the century development of a theory in which law was viewed as an instrument in the control of a society that was changing.²⁰ In order to determine more adequately the needed interests of such a society, legal theorists are forced to consider social factors when formulating and applying law. As a result, law is to be evaluated functionally, in terms of a balance of conflicting social interests to secure the satisfaction of the maximum of wants with the minimum of friction.²¹ This led to

the tendency, in Pound's words, to "look more for the working of law than for its abstract content."²² In doing so, "not only did he develop a sociological theory of the growth of law, but he attempted to set up a sociological analysis as a guide for legal development."²³ Law was to be both the instrument for change when the circumstances demanded and the stabilizing force to insure security.²⁴

In the 1930's a reaction called "legal realism" occurred against American jurisprudence in general and sociological jurisprudence in particular.²⁵ It was an attitude, if not a systematic philosophy, that has influenced legal thinking in the United States for more than a generation. The polemic in which legal realism arose was a paper by Karl Llewellyn²⁶ wherein he observed that the traditional analysis of legal problems in terms of remedies, rights and interests, and law as a body of rules generate ambiguity. Pound and his sociological jurisprudence were accused of a preoccupation with verbal formulation. It was proposed that since the *most* significant aspects of law and society lie in the field of behavior, legal science should concern itself with deeds, not words. The new cry was for a concern with law as human *behavior* instead of the traditional body of rules and concepts.²⁷

About a year later Pound answered this so-called "next step" in the history of legal theory in an article that enumerated and criticized the tenets of the new school, proposing a program of relativist-realist jurisprudence "as it might be."²⁸ The criticism centered around the fact that the legal realists concentrated on particular behavioral patterns of the creators and administrators of the law while de-emphasizing other significant elements, especially ideals, values, rules, concepts, and the techniques of the legal order. The charge, in short, was that legal realism is incomplete.

The legal realists could not remain silent. That same year Llewellyn, assisted by Jerome Frank, answered in an article entitled, "Some Realism about Realism."²⁹ They countered Pound by showing that what he criticized as representative of legal realism was not so. To do this they analyzed and reported the writings of twenty "representative men." The result was an authentic picture of the position of the trend as it existed thirty years ago.

. . . It was pointed out that this was no new school of jurisprudence, but represented rather the complementary efforts of a number of individuals in various fields, with varied techniques, and with diverse predispositions, to extend the knowledge of law by critical or factual investigation. Among these, however, several common points of departure could be discerned: the conception of law and society in flux, with law typically behind [times]; the notion of juridical creation of law,³⁰ the conception of law as means to social ends, and the evaluation of law by its effects; insistence on objective study of legal problems, temporarily divorcing the "is" from the "ought";³¹ distrust of legal rules as descriptions of how law operates or is actually administered, and particularly of their reliability as a prognostic decision; insistence on the need for more precise study of legal situations or decisions in narrower categories

and for sustained programmatic research on these lines. In short, the program implicit in legal realism was detailed, objective study of law as an instrument to achieve desired ends in the context of a changing society.³²

It is at this point that we see that legal realism was less an opposition to sociological jurisprudence than a reformation thereof. In the words of T. A. Cowan: "their opposition to sociological jurisprudence has always been loyal opposition. They opposed, the better to attain pragmatism's avowed aims."³³

In the more than thirty years that have passed since legal realism began its crusade, its original zeal and furor has decreased steadily.³⁴ The movement in its beginning was a vigorous one and had both theoretical and political overtones. The polemic could become heated at times. Llewellyn referred to Pound's theories as "bedtime stories" and to his interpretations of legal realism as manifesting "blindness" and "willful perversity."³⁵

In an attempt to explain their position to the more conservative groups, legal realists began presenting their tenets with decreasing intensity. By the year 1949 and Llewellyn's article on "Law and the Social Sciences, Especially Sociology,"³⁶ the tone is one of moderation and restraint. As a result, "it is necessary to report that most of the intransigence of the legal realists has disappeared. Although they began in opposition to Pound, they [Llewellyn, Frank, etc.] remained to turn their attention to constructive work after the period of sharp critical attack was over."³⁷

In the attempts to state the common ground between legal realists and their critics, it was discovered that the differences between the groups had become less and less sharp. Viewed from one perspective, it can be said that legal realism has spent itself before realizing its full potential. Looked at from another aspect, it can be observed that the attitude toward legal problems characterized as legal realism dominates legal thinking today in the United States. A compromise statement would put it thusly: "the fundamental legal philosophy in America is still pragmatic."³⁸ Thus, the "socio-scientific" attitude toward law as an instrument for social reforms is still very much with us in the United States.³⁹ And, for those contemporaries who do not seem "to fit" into either legal realism or sociological jurisprudence, but who are influenced deeply by the pragmatic concept of law as an instrument for social experimentation, we may introduce the "category" of "legal experimentalism."⁴⁰

Now that we have seen that contemporary legal realism is really within the tradition of sociological jurisprudence we may examine the latest manifestation of this attitude.⁴¹ "A drift towards an increasing recognition of the value problem in legal science can . . . be detected in the writings of some outstanding authors who in the past have been regarded chiefly as exponents of sociological theories of law."⁴² For

example, more recently Pound has paid substantial attention to the moral element in law and to the meaning of justice.⁴³ He observes that justice may be considered as respect for the expectations of any civilization; and, as such, it may serve as a guide for interpretation and application of legal source materials. "Over and above this, justice may also function as an absolute ideal for a society in which every human being is given a chance to live a full and equal social and economic existence."⁴⁴

Similar preoccupation with justice is to be seen in F. S. C. Northrop's work. For him, even the so-called "living law" that acts as an "ideal" for any given culture does not offer the final test of ethical worth and goodness. "It is susceptible of being judged by a standard paramount and superior to it. This standard is a form of natural law described by Northrop as the empirically verified philosophy of nature."⁴⁵ Regardless of the fact of cultural relativism, every civilization lives in the same nature or world. Thus, the character of the physical universe, including man, as known by science can yield us certain ethical and legal norms which are valid, in a general way, for all men. "Although the philosophy of a given person or people refers for its normative prescriptions to culture, it refers to physical nature and natural man for its origin and empirical verification. In other words, no philosophy is merely a specification of a living law for society; it is also at the same time an empirically originated and hence objectively verifiable theory of nature."⁴⁶

As the preceding shows, even those theorists of the "center" who are committed to a thoroughgoing empirical methodology are realizing more and more the need for a value-oriented philosophy of law. Disappointed that the American realist drive for action brought little concrete action, even (or, perhaps, especially) on the part of the realists themselves, distrustful that an empiricist philosophy such as sociological jurisprudence can explain adequately ultimate values in law,⁴⁷ certain legal theorists call for a value-centered jurisprudence that must be classified, in my schemata, as "right" or center. This attitude is generally called "legal idealism." The term in no way intends an identification of the position with the metaphysical and/or epistemological idealism of general philosophy. What is meant by calling this movement "idealism" is that it is concerned with a "higher law" as well as with positive law. And this higher law acts as an "ideal" or guide in the formulation and evaluation of man-made laws. By now it has been acknowledged explicitly that philosophy of law cannot be discussed apart from theory of values.

Perhaps those legal idealists closest to legal realism and its sociological context are Harold Lasswell and Myres McDougal. The teleological element of value-realization and policy-implementation sets apart their thought from that of orthodox realism. They consider "law primarily as a 'flow of decisions' aimed at the materialization of

certain *value patterns* in the national or international community."⁴⁸

Values are "desired" or "likely to be desired events." Which values are ranked universally higher is impossible to determine because of cultural relativism and is unimportant in fact because the precise controlling values must in principle be determined separately for each situation. Law, a form of value, is the sum total of all power decisions in a community that are sanctioned formally by an authority who has an effective control ensuring the execution of these decisions. Only in this way can community values be promoted so that the widest possible sharing of values among men is fostered. "The ultimate goal of legal control, as envisaged by Lasswell and McDougal, is a world community in which a democratic distribution of values is encouraged and promoted, in which all available resources are utilized to the maximum degree, and in which the protection of human dignity is regarded as a paramount objective of social policy."⁴⁹ Throughout runs the proposal that the technical-doctrinal approach to law must be supplemented by the "policy" approach; *i.e.*, key legal terms should be interpreted in relation to goals and vital problems of life as actually lived. At this point there is a sympathy with the pragmatic method, and likewise in their insistence that judicial decisions be based less on precedent and more on the probable impact of the decisions upon the future of the community.⁵⁰

Another group of contemporary American legal theorists, in some aspects close to both legal realism and sociological jurisprudence, takes up an open inquiry into the problem of values and justice, unlike those who call for a "policy" orientated science of law. They are more involved in the interrelations between law and morality.⁵¹ This group, more properly called "legal idealists," includes, among others, Edmond Cahn, Lon Fuller, and Jerome Hall. With these legal theorists we come to a contemporary re-emergence of natural law influences upon American legal thought. As long ago as 1911 Pound observed that it is not surprising that a revival of natural law theory should be occurring.⁵²

. . . Although classical natural law doctrines faced growing hostility in this country from the adoption of the federal Constitution, it cannot be said that natural law influence ever suffered extinction. As a source of inspiration for "higher law" theories, for exaltation of received traditions, for principles of unity and coherence over the body of law, and for emphasis upon the necessity of converting moral obligations into legal ones, the "ideal" element in the law has been the constant concern of able jurists since the beginning of the American legal system. . . . It is too bad for the idealists that the tempting phrase "natural law" is still a little too hot to touch. Its free use would at least put the present-day idealists in a rich historical tradition, a tradition which they feel unable to accept but for which a nostalgic longing pervades their writings.⁵³

Edmond Cahn, closer to legal realism than the others, is convinced that an inquiry into justice is approached better from its negative

side. Our "sense of injustice" leads us to remedy or prevent what arouses us; it warns us against either standing still or leaping forward; it calls for movement in an intelligible design.⁵⁴ Thus, "law, in order to be just, must steer a precarious and hazardous course between regularity that is uncompromising and change that is inconsiderate."⁵⁵

Lon Fuller, in considering the minimum conditions that make a legal system tolerable and workable, denies that a state can long endure by the exercise of organized force to maintain order and affirms the need for some basis for positive law in natural law.⁵⁶ This latter point enters into his study of "purpose" in law. In an effort to bridge the supposed gap between the "is" and the "ought," he points out that a purpose is ". . . at once a fact and a standard for judging facts."⁵⁷ Any sound jurisprudence must take into account the fact of human nature that man is largely a purpose-propelled creature. Because of this, society, as men living together, functions purposively. Positive laws help realize these purposes and must be in accord with the "natural" laws that govern the social order.⁵⁸ In order to avoid the confusion and widespread antagonism invited by the term, "natural law," Fuller suggests the use of the term "eunomics," which he defines as "the theory or study of good order and workable arrangements."⁵⁹ This is not a theory of binding ultimate ends, but a theory of the means by which a legal order can attain the goals of the society of which it is a part.

Jerome Hall, another legal idealist, is concerned with the fundamental values of the social order that law must serve. Experience shows that there is no sharp dichotomy between the "is" and the "ought," between social fact and social value, although both are by no means static because of the shifting of cultural factors. These basic values must be analyzed rationally and expressed clearly in normative statements. "The legal philosopher must, at least in the final act, be a rationalist; i.e., a 'rule of law' man."⁶⁰ This involves an effort to correlate the diverse parts of jurisprudence (the isolated studies) and cultivate philosophical synthesis (build organizations). Such synthesis is the most fruitful goal that jurisprudence can pursue.⁶¹

Hall does not imply that current legal theorists should be indifferent to sociological jurisprudence and realism. A modern American philosophy of natural law will build upon the enduring contributions of our recent past. "It is not in the least a question of 'natural law' versus legal science; instead, the principal question concerns the sound coherence of the various components of an adequate jurisprudence. This requires interpretation of each major facet in the light of the others and an organization of the total product by use of a set of significant ideas."⁶²

My last consideration will be with contemporary manifestations of the more "traditional" natural law theories. By "traditional," I refer to the movement of legal thought that saw its origin in Plato and

Aristotle and its culmination in the Christian thought of the Schoolmen and their modern followers, especially in the work of Thomas Aquinas and the Thomists. Of the recent writings in America that have appeared in natural law in the field of jurisprudence, the Neo-Thomists, by far, have taken the lead in activity.⁶³

In presenting their thought, Neo-Thomists take care to dissociate their position from the so-called "secular natural law" of the seventeenth and eighteenth centuries. These classical modern theories had their origin in the general "reaction" against Scholastic thought and attempted to solve the problem of law independently of any consideration of this problem in relation to theology. The so-called early modern natural trend is considered by the Neo-Scholastics to be only a revival of Scholastic thought which was presented in an inferior manner so that it overlooked the real problem.

We are reminded by his followers that Thomas Aquinas divided his philosophical system of law into three major sections: 1) eternal or divine law; 2) natural law, which is subdivided into a consideration of (a) primary natural law and of (b) secondary natural law; and 3) human or positive law, which is derived from natural law by the use of human reason and must be in conformity with the divine and natural laws. This derivation "is necessary because the natural law is often blurred in the mind or heart of man through sin."⁶⁴

It is by means of the natural law that God maintains order within the created universe. "Since man is a rational creature, endowed with the faculty to know the truth about God, the *lex naturalis* becomes for him in particular a participation in the *lex aeterna*, that is, a participation in the Divine Wisdom."⁶⁵ Eternal law as imprinted on men's souls, directing them in what they ought to do and ought not to do, is what is meant by natural law. "The precepts of the natural law are discovered by reason. . . . The human reason cannot know the Divine reason perfectly and completely. But the speculative reason of man does have a participation in the Divine reason, whereby we have within ourselves a knowledge of certain general principles of right action, which are called 'natural law'."⁶⁶

According to one Neo-Thomist, "the great and important innovation of Thomistic natural law thinking consists in the use of the 'natural practical reason' of man."⁶⁷ This "practical reason" functions parallel to "natural speculative reason." That is, the precepts of natural law are to the practical reason what the first principles of demonstration are to the speculative reason; because both are self-evident.⁶⁸ The most general principle of law, a self-evident principle, is that good is to be pursued and evil to be avoided; from it is drawn "first, certain most general precepts that are known to all; and secondly, certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles."⁶⁹

The "primary natural law" instilled in man's mind by God cannot be blotted out and is as immutable as God. However, the "secondary natural law," a body of conclusions drawn from the primary, can be blotted out, either by evil persuasion, corrupt habits, and vicious custom, or by certain human laws which are contrary to natural law.⁷⁰ These so-called "secondary natural law" principles, in so far as they are concerned with practical matters which are singular and contingent, do not have absolute certitude. It is not necessary for every rule to be altogether unerring and certain but only according as it is possible in its own particular genus.⁷¹ Thus, the secondary principles of the natural law are not valid for all times and places, but do and must change according to "contingent matters."⁷² The change is in the form of an "addition" to supply what is wanting in natural law when applied to particular circumstances.⁷³

Human law proceeds from the precepts of the natural law as the more particular from the more general principle.

Man must have laws framed by man because he cannot achieve perfection of virtue — which is his end in life — by himself. The object of law is to let man have peace and virtue. Man cannot gain virtue by himself alone because "the natural law was perverted in the hearts of some men, as to certain matters . . . which perversion stood in need of correction."⁷⁴ It is, in short, the fall of man which perverted human nature, blurred his reason, and weakened his will.⁷⁵ The human law is to enable disabled persons to follow the dictates of the natural law.⁷⁶ . . . Though the positive law is framed by man, it is not in the form of an arbitrary command by a sovereign or despot, because all human law must stand in close relationship to natural law.⁷⁷ Or, to be more exact, all power to frame human law must be derived from natural law.⁷⁸ A law which is not in conformity with natural law is no law at all.⁷⁹ "The first rule of reason is the law of nature . . . consequently every human law has just as much of the nature of law as it is derived from the law of nature."⁸⁰

The end of human law is to be useful to man. By being such it should be conducive to virtue,⁸¹ and likewise to justice as suitable to time, place, and custom; and necessary for the common good.⁸² Human law is thus neither absolute nor unchangeable, for it is a dictate of an intellect that gradually advances by reasoning; *i.e.*, by passing from the imperfect to the perfect realization of the common good.⁸³ As man's conditions change, so do his requirements, and so must law if it is to fulfill its purpose of utility; *i.e.*, as means to an end — the happiness of man.⁸⁴

It should be clear that this position cannot recognize the dichotomy between the "is" and the "ought." For Aquinas, law is part of morality, along with individual morality and certain practical matters such as economics. The basic "ought" as applied to human law is negative; namely, that it ought *not* to contradict the principles of the natural law, which is the moral law.⁸⁵

The foregoing survey of the contemporary Anglo-American scene in jurisprudence should suffice as the background for the observations

I now intend to make. The first major task on the road to some sort of agreement in legal theory is, in my opinion, to convince the more positivistic jurisprudes that there is no *absolute* dichotomy between the "is" and the "ought."⁸⁶ Contemporary positivistic jurisprudence still suffers from the Cartesian purge of teleology from natural science. Refusing to acknowledge a "basic" difference in methodology between the natural and the human sciences, positivists seek to cleanse jurisprudence of values in favor of pure facts.⁸⁷ The distinction between fact and value, made originally for purposes of study and control of a certain subject matter, becomes as absolutely exclusive, one of the other, as the two Cartesian realms of substance or the two worlds of Kant.

A positivistic position such as that of analytical jurisprudence seems, in the end, to object merely to the swallowing up of jurisprudence by ethics, to the absorption of the philosophy of law by the philosophy of values. But in proposing a theory of law independent of ethics, analytical jurisprudence, in fact, becomes an ethical theory. This split of the "is" and "ought" of law is a particular kind of "ought" — namely, that law *ought* to deal only with the *is*. And the same can be said of Kelsen's pure theory of law.⁸⁸

If and when the more positivistic jurisprudes acknowledge this implicit ethics,⁸⁹ they would see that the basic question in philosophy of law is not whether values should enter a theory of law, but how can we determine accurately *which* criterion of value is to be embraced.

There is no reason why the so-called "science" of law that has been the goal of the more positivistic theories cannot retain its validity within an ethical framework of the more naturalistic legal theories. The logical character of law does not necessarily imply a denial that law is also axiological. In so far as this project might be declared to be impossible by the naturalists as well as the positivists, to that degree they declare positivism itself to be an ethical position. And if this is so, the question remains: How can we determine *which* ethical position is to be embraced.

The second major task is the actual determination of an ethical norm. In my opinion, the commencement of this search demands the recognition of man as a purposive animal, at least in so far as his *human* acts are concerned. In the words of Lon Fuller:

A purpose is, as it were, a segment of a man. The whole man, taken in the round, is an enormously complicated set of interrelated and interacting purposes. This system of purposes constitutes his nature, and it is to this nature that natural law looks in seeking a standard for passing ethical judgments. That is good which advances man's nature; that is bad which keeps him from realizing it. Just as the dichotomy of *is* and *ought* does not apply to the act of reaching toward the realization of a single purpose, so it is equally inapplicable to a whole purpose system. From the reaching that is imbedded within that system, we can learn in what directions it should reach.⁹⁰

All philosophies recognize, at least in a general manner, that we know what a thing is by the way it operates. Man acts the way he does because he is the kind of being he is. In so far as man's acts are human acts, they are vehicles of expression of the purpose for which they were executed. Although the act is undertaken in order to fulfill the purpose and not to express it, to an outside observer it likewise expresses the purpose.⁹¹ The task at this point is to determine the reliability of this method to determine what man is and how he ought to act to maintain and develop his identity.

The third and last major task is the most difficult. Here legal theorists are brought to the threshold of metaphysics, for the determination of what man is will lead ultimately to a view of what reality is.⁹² The opposition in this area is so basic that, in my opinion, a starting point toward agreement cannot be discovered. Concerning metaphysical ultimates and man's relation thereto, I discern two mutually contradictory positions: supernaturalism and naturalism. Naturalism denotes, in this metaphysical context, the position that regards all reality as within a single space-time continuum and subject to a single system of laws.⁹³ Accordingly, the end of man is in the here and now.⁹⁴ In contradiction to this view we find so-called "supernaturalism" that holds to some sort of Deity as the First Cause and Final End of man.

I make bold to suggest that these basic metaphysical differences, once isolated, can be by-passed, to some degree at least, to enable legal theorists to work together more closely.⁹⁵ What is envisioned is *not* an eclectic, lowest, common denominator type of metaphysics or an agnosticism concerning ultimates. I would be the first to acknowledge that the result can be no more than a "cold war" on the metaphysical front. But the task that is a realistic jurisprudence is well worth the attempt even if the result does not involve unanimous consent on ultimates. Time does not stand still, problems are not dispelled, until men have agreed upon what reality is. It is the scandal of mankind that the "wise men" of the law lack the charity and prudence that enable man to live peacefully with his neighbor even when he cannot convert him.⁹⁶

FOOTNOTES

¹ Thomas A. Cowan, *The American Jurisprudence Reader* (N.Y.: Oceana, 1956), p. 28.

² See Ronald F. Howell, "Search for Jurispolitical Philosophy," XLIV *Virginia Law Review* (1958) 409ff., for an attempt to bridge the gap between legal and political philosophy by grounding both in man's ethical character. Such an effort is most commendable, for once some semblance of agreement emerges in legal theory, as well as in political thought, both must be shown to be aspects of man's moral condition.

³ For surveys of recent jurisprudential trends in other countries, see Brendan F. Brown, *The Natural Law Reader* (N.Y.: Oceana, 1960), pp. 30-46,

which includes the revival of natural law in Latin America, France, Germany, and Italy.

Raymond Klibansky, ed. *Philosophy in the Mid-Century* (Firenze, Italy: La Nuova Italia Edirice, 1958), pp. 102-124, which includes: G. E. Langemeijer, "Philosophie du droit"; Guido Fasso, "La Philosophie du droit en Italie"; Joseph L. Kunz, "La Philosophie du droit en Amerique Latin."

Josef L. Kunz, *Latin-American Philosophy of Law in the Twentieth Century* (N.Y.: New York U. School of Law, 1950).

Edward McWhinney, "Legal Theory and Philosophy of Law in Canada," in E. McWhinney, ed., *Canadian Jurisprudence, The Civil Law and Common Law in Canada* (Toronto: Carswell, 1958), pp. 1-23.

Luis Recasen-Siches, "Juridical Axiology in Ibero-America," 3 *Natural Law Forum* (1958) 35ff.

E. Bodenheimer, "Significant Developments in German Legal Philosophy Since 1945," 3 *American Journal of Comparative Law* (1954) 379-96.

J. J. Santa-Pinter, "El estado de derecho en la Argentina," 30 *Rev. Jur. U.P.R.* (1961) 223.

H. W. Babb and J. N. Hazard, eds., *Soviet Legal Philosophy* (Cambridge: Harvard University, 1951).

Hans Kelsen, *The Communist Theory of Law* (N.Y.: Praeger, 1955).

- 4 "[Finally] can it be doubted that the distinctive character of current jurisprudence is closely associated with the post World War? It is only necessary to recall the barbarous ideologies of the dictatorships to appreciate the motivation of legal philosophers in many countries to bring law and value into significant interrelations. This challenge has become a vastly complicated international affair, and the horizon of the legal philosopher who deals with this perennial problem must be proportionally wider. This . . . is one of the principal characteristics and problems of current American jurisprudence." Jerome Hall, "The Present Position of Jurisprudence in the United States," 44 *Virginia Law Review* (1958) 326.

- 5 "The most striking fact among current national developments is the rise of natural law philosophies almost everywhere. England, Sweden, and Denmark [as well as Russia] are among the few countries which do not participate in this world movement. . . . What must be emphasized . . . is that logical analysis and sociological positivism [both "positivistic"] are marginal currents in the world picture. The salient fact, as noted, is the almost world-wide rise of natural law philosophies. Though this is especially noteworthy in Germany, it is also prominent in Japan and Latin American countries, where positivism was previously dominant. In many other countries since the last war legal philosophers have been seeking to construct a jurisprudence that is grounded in rationally defensible values." *Ibid.*, 321-22.

Perhaps the most unequivocal condemnation of positivism, the result of a post-Second World War re-examination of the foundations of law, is that by the late Gustav Radbruch (d. 1949). From a pre-Nazi position that can be characterized as legal relativism, maintaining a dichotomy between the "is" and the "ought," he turned to a position that called for a restoration of a sort of traditional natural law. As he sees it, the conception that "law is law" (free from any criterion of values) leads to the invalidation of whole portions of the National Socialist legislation when evaluated by justice.

According to Radbruch: "We [Germans] must hope that the denial of the fundamentals of law and justice that occurred under Hitler will remain an isolated and not-to-be-repeated aberration of the German people in a state of temporary derangement. Yet to be prepared for every eventuality we must arm ourselves against the return of such a state of affairs. To do this we must thoroughly overcome the positivistic legal philosophy that rendered impotent every possible defense against the abuses of the National Socialist legislation." Quoted by Lon L. Fuller, "American Legal Philosophy at Mid-Century," 6 *Journal of Legal Education* (1954) 485.

In making this particular illustration I do not infer that non-Nazi legal positivists condoned the Nazi regime. The illustration is to show how the consequences of the Second World War were the starting point of a shift to "higher law" theories.

- ⁶ Introductory words of his first lecture in *Lectures on Jurisprudence*; quoted by Cowan, *op. cit.*, p. 95. See Samuel I. Shuman, *Legal Positivism, Its Scope and Limitations* (Detroit: Wayne State University, 1963).
- ⁷ Samuel Enoch Stumpf, "Austin's Theory of the Separation of Law and Morals," 14 *Vanderbilt Law Review* (1960) 117.
- ⁸ E.g., H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). Edgar Bodenheimer, "Analytical Positivism, Legal Realism, and the Future of Legal Method," XLIV *Virginia Law Review* (1958) 366, n. 4.
- ⁹ As pointed out by E. Bodenheimer: "In 1900 it was possible to speak of an 'Anglo-American Jurisprudence' in the sense of an essential unity of thinking among the two chief English-speaking nations of the world in the domain of human thought. The parallelism of trends in Great Britain and the United States was sufficiently strong and conspicuous to warrant the use of the hyphenated designation. In contrast to this situation, a rather wide chasm has opened up between American and English legal philosophy in more recent times. The American legal realist movement has found little echo and approval in Britain; and with a few exceptions [Goodhart, *English Law and the Moral Law* (1953); Lamont, *The Principles of Moral Judgment* (1946); A. P. d'Entreves, *Natural Law* (1951)], the renaissance of ethical and natural law philosophy in the United States has evoked scant enthusiasm in Oxford, Cambridge, and London. English jurisprudence today is still in the grip of analytical and positivistic thinking, although it cannot be denied that some new insights have been added to the contributions of Austin, Holland, and Salmond. It appears justifiable under these circumstances to assert that, while jurisprudence in the United States has recently exhibited a vigorous dynamism in exploring facets of legal reality which the preceding era tended to ignore or bypass, English jurisprudence has not kept pace with the American tempo of advance and, on the whole, has remained rather stagnant. The widening of the gap has proceeded to the point where it is no longer an exaggeration to say that jurisprudence in the United States achieved a well-nigh complete emancipation from the legal philosophy hegemony of its erstwhile mother country." "A Decade of Jurisprudence in the United States: 1946-1956," 3 *Natural Law Forum* (1958) 46. Also see Hart, "Philosophy of Law and Jurisprudence in Britain (1945-1952), 2 *American Journal of Comparative Law* (1953) 355.
- ¹⁰ Hans Kelsen, *Reine Rechtslehre*, i; quoted by Cowan, *op. cit.*, p. 95. It has been pointed out recently that probably no theory of law is as misunderstood as that of Kelsen. Reginald Parker, "The Pure Theory of Law," 14 *Vanderbilt Law Review* (1960) 211.
- ¹¹ Cf. Edward McNall Burns, *Ideas in Conflict*, "The Political Theories of the Contemporary World" (N.Y., Norton, 1960), pp. 134-141 for a dispute of this.
- ¹² "Judgments of justice cannot be tested objectively. Therefore, a science of law has no room for them." Hans Kelsen, *General Theory of Law and State*, (1945) 49; Kelsen, *Reine Rechtslehre*, 197.
- ¹³ "Patterson's conception of the imperative theory as a theory of the power of man appears clearly when he makes the surprising criticism of Kelsen that he "stops" with the basic norm, instead of carrying his analysis through, as Austin does, to the final law-creating agency or sovereign. Surely it is Austin, and not Kelsen, who fails to see the full implications of his own theory. It is true that Austin tried to treat his "sovereign many" as people who enjoy a habit of obedience running toward them, and who thereby gain the power to create law. But they are people powerless to create valid law except when they act according to the modes and forms established for the expression of the sovereign will. They can enact law only by following law. This is the fundamental truth underlying Kelsen's basic norm." Fuller, *op. cit.*, p. 462.

- 14 "A norm the validity of which cannot be derived from a superior norm we called a 'basic' norm." Kelsen, *General Theory of Law and State*, 11.
- 15 Kelsen, *Reine Rechtslehre*, 212-221; Kelsen, *General Theory of Law and State*, 118-122.
- 16 Kelsen, *Reine Rechtslehre*, 222; Kelsen, *General Theory of Law and State*, 369; Kelsen, *Principles of International Law* (N.Y.: Rinehart, 1952). Prof. Parker points out that "nothing can demonstrate more forcefully the weak character of international law than its basic norm. As a matter of fact, one seriously doubts whether the above-quoted restatement, and therefore international law as such, has any normative character." Parker, *op. cit.*, pp. 215-16.
- 17 Parker, *op. cit.*, p. 216.
 "It is misleading to assert, as Patterson does [*Jurisprudence*, "Men and Ideas of Law" (1953), p. 262], that Kelsen insists his basic norm is not a "natural-law" concept. On the contrary, he has in effect admitted that it represents the minimum of "natural law" without which any system of possible law is impossible." ["The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law . . . The idea of a pure positive law, like that of natural law, has its limitations." Kelsen, *General Theory of Law and State*, p. 401.] Fuller, *op. cit.*, p. 461.
- 18 For a list of bibliographies of Kelsen and his followers, see Julius Stone, *The Province and Function of Law* (Cambridge: Harvard University, 1950), p. 91, n. 1.
 For the influence of Kelsen, see W. Friedmann, *Legal Theory* (London: Stevens & Sons, 1953, 3rd ed.), p. 120; Stone, *op. cit.*, p. 91, n. 2.
 For Kelsen's influence in Latin America, see Joseph L. Kunz, "La Philosophie du droit en Amerique Latine," in Raymond Klibabsky, ed., *Philosophy in the Mid-Century*, Vol. III (Firenze, Italy: La Nuova Italia Editrice, 1958), p. 122.
- 19 Besides Roscoe Pound, Benjamin N. Cardozo and Harlan F. Stone should be mentioned as contributing to this new trend. Fred V. Cahill, *Judicial Legislation* (N.Y.: Ronald, 1952), p. 70. See p. 71, n. 1 for others in this new trend. Concerning Cardozo and Stone, note the following: "The position of Benjamin N. Cardozo in the development of sociological jurisprudence is equal to and possibly even greater than that of Pound." *Ibid.*, p. 83, and "Stone came to accept the sociological position only after a rather vigorous rejection of its assumptions." *Ibid.*, p. 81.
- 20 Hence the theory is called "social engineering." Cahill, *ibid.*, p. 77, n. 14., shows why a happier metaphor could have been used. The most accurate description of the attitude would be "functional" jurisprudence, but the name never caught on. Cf. Carleton K. Allen, *Law in the Making* (Toronto, 1946), p. 29; George W. Paton, *A Textbook of Jurisprudence* (Oxford, 1946), p. 18.
- 21 ". . . Pound sometimes insisted that law depends upon sociological data and sometimes looked at law as a sociological phenomenon. He used 'sociological jurisprudence' to describe both views." Cahill, *op. cit.*, p. 128, n. 32. Pound's approach as a "social engineer" has remained the same through the years but the precise social interests, as can be expected, have changed from time to time.
- 22 Pound, "The Scope and Purpose of Sociological Jurisprudence," 25 *Harvard Law Review* (1911) 489.
- 23 Cahill, *op. cit.*, p. 71.
- 24 "Law must be stable and yet it cannot stand still, hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change. The social interest in the general security has

led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in circumstances of social life demand continual adjustments of the pressure of social interests as well as to new modes of endangering society." Pound, *Interpretations of Legal History*, (London, 1923), p. 1.

- 25 The term, "legal realism," carries no precise denotation beyond indicating a certain deep skepticism it has in common with many other American theories.
- 26 Karl Llewellyn, "A Realistic Jurisprudence — The Next Step," 30 *Columbia Law Review* (1930) 431.
The paper was presented originally at a meeting of the American Political Science Association in December, 1929 by Llewellyn, who was then of the Columbia Law School Faculty. It must be pointed out that the "tendencies" of which legal realism was to be the outgrowth go back before 1930 and include, to name only the most important, Oliver Wendell Holmes, John Chipman Gray, Joseph W. Bingham, Jr., Arthur F. Bentley, and John Dewey.
- 27 "The conception of human behavior as the subject matter of social science, Llewellyn was quick to observe, was not novel; it was the accepted principle of ethnology and other disciplines, and had been suggested in the field of law. What he insisted on as the next step in jurisprudence was to apply the principle systematically to legal problems." Hessel E. Yntema, "American Legal Realism in Retrospect," 14 *Vanderbilt Law Review* (1960) 318.
- 28 Throughout it all Pound did acknowledge legal realism as the philosophy of the coming generation of legal scholars in the United States. The article appeared in 44 *Harvard Law Review* (1931) 697, which celebrated the ninetieth birthday of Mr. Justice Holmes, who was to become a sort of patron saint to the legal realists. Statements by him such as: "the life of law has not been logic; it has been experience"; and "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law" were to be the slogans of these American realistic jurists.
- 29 44 *Harvard Law Review* (1931) 1222-64. Herein he hailed Joseph W. Bingham, Jr.'s attack on the concept of generalization as making him the first legal realist. *Ibid.*, pp. 1222, 1244. Cahill, *op. cit.*, p. 102, n. 13.
- 30 The legal realists insist that law is not "discovered," but that it is "made" by the judiciary. This position entails a negation of traditional logic and its use by the judiciary to "deduce" decisions from general law. They attacked the position that held that judges take a problem, any problem, push the buttons on the big machine that correspond to those symbols, and the right answer automatically pops out at the bottom. Cahill, *op. cit.*, p. 135. This theory also is referred to as holding the judge to be a "logical calculating machine" and the theory as the "phonographic" theory. *Ibid.*, p. 141.
- 31 Llewellyn's distinction between "is" and "ought" was conceived as a temporary divorce, "... necessary to secure objectivity in the study of human conduct, separating the observation of what conduct occurs in actuality from consideration of what such conduct ought to be. This is reminiscent of the distinction in Hans Kelsen's pure theory between *Sein* and *Sollen*, with, however, radical differences. The pure theory of law is a permanent and absolute divorce of law conceived as a sanctioned system of hypothetical norms, not merely from what "is" but even from nonsanctioned philosophic or moral ideas. Thus legal realism is chiefly concerned with precisely what Kelsen's pure legal science would exclude. But even as a temporary expedient, the distinction was criticized by Pound on the ground that faithful portrayal of official behavior without reference to the ideas, values, and technical preconceptions by which it is motivated excludes significant actualities of the legal order." Yntema, *op. cit.*, p. 324.
"In so far as legal realism accepts Llewellyn's separation of the Is and the Ought in the study of law, it does not necessarily involve a theory of judicial legisla-

tion. It must be remembered, however, that the separation of the Is and Ought is only a temporary one. Although the reuniting of Is and Ought is not always perfectly achieved, legal realism is, like sociological jurisprudence, a theory of legal reform. . . . It is essential to recognize, however, that the immediate purpose of the broadening of the area of judicial discretion was to increase the predictability of the legal process. At this point, the theory of a 'science of law' and the theory of legal reform come together: the Is and the Ought are reunited The attack upon the 'scientism' of legal realism resulted in an emphasis upon the fact that the 'separation between Is and Ought' was at most only temporary. The legal realists insisted that although their approach did involve an increased attention to empirical data, they were conscious that the problem was not wholly empirical." Cahill, *op. cit.*, pp. 122, 125, 144.

- 32 The studies and experiences of Judge Jerome Frank in appellate and trial practice, ". . . influenced by exposure to psychology and psychiatry, led him in 1930 to publish a work of unusual influence, *Law and the Modern Mind*, which expressed his conclusion that certainty of law is an illusion, a fictitious, unconscious pretence to satisfy the infantile craving of the public for security." Yntema, *op. cit.*, p. 321. Cahill, *op. cit.*, pp. 132, n. 45; 133, n. 47; 134. This summary of the position of legal realism shows the relation between it and the work of John Dewey, ". . . who occupies an almost official position as philosopher for the modern American legal theorist; he is himself one of the modern legal theorists. His influence is therefore double, although there is little to indicate that the community of the conclusions between Dewey and many of the legal realists in all cases implies a community of premises." *Ibid.*, p. 108. Also see John Dewey, "Logical Method of Law," 10 *Cornell Law Quarterly* (1924-25) 17-27; "Nature and Reason in Law," in 2, *Characters and Events* (N.Y.: Holt, 1929); "The Historical Background of Corporate Legal Personality," 35 *Yale Law Journal* (1926) 655-673; "My Philosophy of Law," in a collection of 16 essays under the same title (Boston: Boston Law Book Co., 1941), pp. 73-85. For articles on Dewey's legal theory see: Edwin Patterson, "Pragmatism as a Philosophy of Law," in *The Philosopher of the Common Man*, (N.Y.: Putnam, 1940), p. 172ff; "Dewey's Theories of Legal Reasoning and Valuation," in Sidney Hook, ed., *John Dewey: Philosopher of Science and Freedom* (N.Y.: Dial Press, 1950), p. 118 ff.; Anton Donoso, "John Dewey's Philosophy of Law," 36 *University of Detroit Law Journal* (1959) 579-606; "La filosofía del derecho de John Dewey," 29 *Revista Jurídica de la Universidad de Puerto Rico* (1959) 5-38; "The Ethical Foundation for the Pragmatic Conception of Justice," 16 *Vanderbilt Law Review* (1962) 159-171; Jay Wesley Murphy, "John Dewey - A Philosophy of Law for Democracy," 14 *Vanderbilt Law Review* (1960) 291-316.
- 33 Cowan, *op. cit.*, p. 22.
- 34 The main exception to this was the late Judge Jerome Frank. As late as 1949 (*Courts on Trial*, p. 33, n. 43) he was demanding an "unblinding of justice," by which he meant a relaxation of the principle that justice is to be administered without respect to individual persons. Instead, he called for a "rule of discretion" whereby the judges would be granted a wider use of their own abilities to decide individual cases according to particular social conditions.
- 35 Karl Llewellyn, "Through Title to Construct and a Bit Beyond," 15 *New York University Law Quarterly* (1938) 159, 162. Also see Karl Llewellyn, "A Realistic Jurisprudence - The Next Step," 30 *Columbia Law Review* (1930) 431, 435, n.
- 36 62 *Harvard Law Review* (1949) 1286.
- 37 Cowan, *op. cit.*, pp. 22-23. Again: "Stronger in criticism than in constructive force, the early phase of the realist movement was one of the most active periods in American jurisprudence. There is no doubt that the realists opened themselves to

criticism and were guilty of overstatement . . . it will be necessary to await the refining influence of time and criticism before the final contribution of the realists can be weighed." Cahill, *op. cit.*, p. 137; *cf. ibid.*, pp. 146-48.

³⁸ Cowan, *op. cit.*, p. 20.

³⁹ This influence is at least twofold: the legal realists, even more than sociological legal theorists "have helped greatly to banish the now outworn notion that judges are only discovering the law when they are in fact engaged in judicial legislation." William Seal Carpenter, *Foundations of Modern Jurisprudence* (N.Y.: Appleton-Century-Crofts, 1958), p. 222. Moreover, legal education has become much more "liberal" or social science orientated due to the reaction of legal realism. *Cf. Yntema, op. cit.*, pp. 329-30.

For a general view of contemporary educational methods in law faculties, see Edward McWhinney, "Philosophy of Law in Contemporary American Law Schools," 33 *Proceedings of the American Catholic Philosophical Association* (1959) 143-48.

⁴⁰ I have "borrowed" this term from T. A. Cowan, as seen on page 189 ff. of *The American Jurisprudence Reader*. Prof. Cowan calls it "an attempt at a radical implementation of a certain aspect of sociological jurisprudence and the realist revolt against 'legal fundamentalism'." He continues: "This movement has for its inspiration the idea that law and the social disciplines can be combined in an experimental science. . . . It is necessarily visionary at present, since no social science is truly experimental as yet." The attitude expressed herein is a continuation of the trend, largely associated with the name of Dewey, to apply scientific method to all areas of human endeavor, including morals. In his section devoted to the "visionary" attempt, Cowan includes readings from Underhill Moore, Frederick K. Beutel, Julius Cohen, Reginald A. H. Robson, Alan Bates, and himself. See Cowan, "Legal Pragmatism and Beyond," in *Interpretations of Modern Legal Philosophies*, "Essays in Honor of Roscoe Pound" (1947).

I would not hesitate to add the name of Edwin Patterson, whose book on *Jurisprudence* is called "the major text in the field published in the United States during the last decade." See Edgar Bodenheimer, "A Decade of Jurisprudence in the United States: 1946-1956," 3 *Natural Law Forum* (1958) 47. Although the book reveals, as pointed out by Bodenheimer, ". . . a stronger bond and continuity [due to its ethical neutrality] with the accustomed positivistic and analytical strain in English jurisprudence than most other recent American contributions (*ibid.*, p. 47)," it transcends the limitations of the positivistic view of law as social control. For this Patterson turns to sociological jurisprudence and his analysis of the judicial process is close to legal realism. See his "Some Reflections on Sociological Jurisprudence," 44 *Virginia Law Review* (1958) 395.

If one appreciates the naturalistic and humanistic foundations of pragmatism, one cannot but help identify "legal instrumentalism" with the "adequate humanistic legal science" of which Hessel E. Yntema speaks. Prof. Yntema, calling legal realism a "child of its time," sees it as preparing the way for "a more adequate humanistic legal science that we hope may succeed. . . . The next step in jurisprudence must be not to abandon the critical achievements of legal realism, but also to develop on more constructive lines, including particularly those that realism tended to ignore. This would necessarily involve a humanistic conception of legal science, with due attention to systematic analysis of legal theory and to historical research and comparative legal research. . . . In short, the stage is set for a development of legal science in the United States, which, conducted in the humanistic spirit of inquiry that inspired American legal realism and extended to encompass the variegated affairs of the modern world, will liberalize the study of the law and provide knowledge that is much needed not merely to maintain but to adjust the legal order to current needs." Yntema, *op. cit.*, 329-30.

Finally, in the same issue of the *Vanderbilt Law Review*, see the study by Jay Wesley Murphy on "John Dewey — a Philosophy of Law for

Democracy," pp. 291 ff. Herein we see Dewey's personal role in preparing for the latest "next step."

- ⁴¹ It is now proper to refer to current American jurisprudences as post-Realist. This is because realism as a movement is past history. There are, of course, realistic tendencies but these are termed more properly "pragmatic."
- ⁴² E. Bodenhimer, "A Decade of Jurisprudence in the United States of America: 1946-1956," 3 *Natural Law Forum* (1958) 63.
- ⁴³ This is to be found in his *Justice According to Law* (1951). It is to be noted that Prof. Bodenhimer sees as one of the most fundamental issues of jurisprudence an inquiry into the meaning of justice. For this reason he welcomes Pound's concern and for this reason he finds fault in Patterson's *Jurisprudence* and Friedmann's *Legal Theory*. Bodenhimer, "A Decade of Jurisprudence," pp. 48, 49.
He further observes (p. 59) that "neither the legal realists nor the advocates of a law-policy science deal directly or explicitly with a problem that in other epochs was regarded as the crucial test of the meritoriousness of a legal philosophy, viz., the problem of justice." Others see legal realists at least beginning to be concerned with "justice." Cf. Cahill and Yntema.
- ⁴⁴ Bodenhimer, "A Decade of American Jurisprudence," pp. 63-4.
- ⁴⁵ F. S. C. Northrop, "Naturalistic and Cultural Foundations For a More Effective International Law," 59 *Yale Law Journal* (1950) 1430, 1448. See also, Northrop, "Ethical Relativism in the Light of Recent Legal Science," 52 *Journal of Philosophy* (1955) 649.
- ⁴⁶ Northrop, "Contemporary Jurisprudence and International Law," 61 *Yale Law Journal* (1952) 623, 650.
Another recent concern with justice from a philosopher in the pragmatic tradition is Raymond Jaffe's *The Pragmatic Conception of Justice* (Berkeley: University of California, 1960). Prof. Jaffe attempts to establish by the pragmatic method a criterion of justice "which is universally compelling logically and psychologically, that is to say, which has the force both of truth and of authoritative command (p. 3)." He undertakes this in the face of criticism from a contemporary positivism that maintains that experiment cannot warrant a norm of justice.
- ⁴⁷ According to Prof. McWhinney, "what is really, in the ultimate, a problem of values and value-choice is concealed in the interstices of methodology" (*op. cit.*, p. 147). This is a pinpointing of the danger of any philosophy becoming methodology, be it positivism or pragmatism.
- ⁴⁸ Bodenhimer, "A Decade of American Jurisprudence," p. 53, italics added. Bodenhimer refers to their theory as "law-policy science" or "policy science." See Fuller, *op. cit.*, p. 479, for a criticism of both McDougal and Lasswell.
- ⁴⁹ Bodenhimer, "A Decade of American Jurisprudence," pp. 54-5, contains a summarization; see footnotes of these pages for the original sources.
- ⁵⁰ Myres McDougal, "Law and Power," 46 *American Journal of International Law* (1952) 102, 110.
- ⁵¹ See Cahn, *The Moral Decision* (Bloomington: Indiana University, 1955).
- ⁵² Cowan, *op. cit.*, p. 70.
- ⁵³ *Ibid.*, pp. 23, 24.
- ⁵⁴ Cahn, *The Sense of Injustice* (N.Y.: New York University, 1949), p. 13 ff.
- ⁵⁵ Bodenhimer, "A Decade of American Jurisprudence," p. 60.
- ⁵⁶ Cf. the following: "The prevention of indecencies in the use of governmental power must depend ultimately on the pressures of public opinion, particularly the opinion of the legal profession. This opinion can be

effective only if it is informed when it accepts a view that treats governmental power as a *brute datum* and refuses to examine the rational and moral grounds of its justification and acceptance." Fuller, *op. cit.*, p. 465.

- 57 "As for the application of the dichotomy of *is* and *ought* to the law, it is fairly clear that with legal precepts, as with the instructions for assembling a machine, what a direction *is* can be understood only by seeing toward what end result it is aimed. The essential meaning of a legal rule lies in a purpose, or more commonly, in a congeries of purposes. Within the framework of this purpose, or set of related purposes, the sharp dichotomy between fact and evaluation cannot be maintained; the "fact" involved is not a static datum but something that reaches toward an objective and that can be understood only in terms of that reaching." Again: "In principle, at least, Patterson accepts "the dichotomy of fact and value" and the impossibility of deriving "value judgments" from "facts." In this I differ from him, for I believe that this time-worn dichotomy requires serious modification when applied to purposive human behavior as a simple illustration will show," Fuller, *op. cit.*, pp. 470, 469. It must be pointed out that, although this article is largely a review of Patterson's *Jurisprudence*, it does contain a valuable exposition of some important tenets of the author's own philosophy of law.
- 58 "All of these studies [e.g., business administration, economics, and political science] are directed toward discovering and utilizing what may be called the "laws" of social order. These "laws" are in turn "natural" in the sense that they represent compulsions necessarily contained in certain ways of organizing men's relations with one another." Fuller, *op. cit.*, pp. 475-76.
- 59 Fuller, ed., *The Problems of Jurisprudence* (1949), p. 477; quoted by Bodenheimer, "A Decade of American Jurisprudence," pp. 61-2, 79-80. "What is the reason for this neglect? I can only explain it as an exaggerated reaction against the theory of natural law. Natural law is an unpleasant, discredited, out-moded doctrine; let us, therefore, embrace its opposite. Its opposite teaches that there is no such thing as a "natural law of social order." Society is just what we choose to make it, and the way we shape its inertly pliant forms is guided, not by "laws," but either by "intangible values" or by selfish class interests. In following this line of reasoning we have, I think, definitely thrown the baby out with the bath
"In attempting to define a branch of social study that might be called economics, I stated that an acceptance of this subject as worthy of pursuit implies no commitment to "ultimate ends." I was careful not to say that economics is indifferent to ends. In view of the interaction of means and ends any sharp distinction between a science of means and an ethics of ends is impossible. In leaving the problem of "ultimates" unresolved I meant merely to acknowledge that after a careful study of the interaction of means and ends with respect to a particular problem, men may still differ as to what ought to be done and that economics cannot promise to resolve all such differences
"If there are constancies and regularities that persist through a change in social forms these must reflect some constancy in the nature of man himself. It is at this point that the subject I have called economics reaches common ground with the natural law theory of the source of ethical judgments." Fuller, *op. cit.*, pp. 477, 480; 481.
- 60 Jerome Hall, "The Present Position of Jurisprudence in the United States," *XLIV Virginia Law Review* (1958) 324.
- 61 *Ibid.*, p. 344.
In his discussion Hall makes a distinction, which I am not making, between jurisprudence and legal theory. [I would rather refer to the areas as the philosophy of natural law and the theory of positive law, respectively. Thus, legal theory becomes the bridge between positive law (a "science") and natural law (jurisprudence). As used in my discussion, however, both jurisprudence and legal theory mean philosophy of law.] Note the following: "Jurisprudence is a higher level of abstraction than legal theory, just

as the latter is more abstract than the ideas comprising positive law. What is extremely important is that the three levels of thought are closely inter-related. Legal theory, because it developed slowly and spontaneously in direct relation to expert knowledge of particular fields of positive law, is free from the artificiality that often constitutes a dismal jurisprudence. If legal philosophers would concentrate upon legal theory as the bridge between jurisprudence and law, the result, as legal theories accumulated and were resolved into their elements, would be a jurisprudence constructed upon a proven foundation — the solid foundation of well considered, frequently tested legal theory. Not the least important result of this procedure would be the easy recognition of both policy and fact in law and thus, of the ontology, scope, and functions of an adequate jurisprudence." p. 325.

⁶² *Ibid.*

⁶³ For a partial bibliography of works appearing during the decade 1946 - 56, see Edgar Bodenheimer, "A Decade of Jurisprudence," 65 - 6.

The following is a partial list of articles appearing since Bodenheimer's work:

V. J. Bourke, "Natural Law, Thomism and Prof. Nielsen," 5 *Natural Law Forum* (1960) 112.

L. I. Bredvold, "The Meaning of the Concept of Right Reason in the Natural Law Tradition," 36 *University of Detroit Law Journal* (1958) 117.

B. F. Brown, "Influence of St. Thomas Aquinas on Jurisprudence," 3 *Catholic Lawyer* (1957) 356.

G. W. Constable, "Who Can Determine What the Natural Law Is?" 7 *Natural Law Forum* (1962) 54.

A. P. D'Entreves, "Case For Natural Law Re-examined," 1 *Natural Law Forum* (1956) 5.

J. F. Garcia, "Thomistic Natural Law," 8 *Catholic Lawyer* (1962) 31.

J. B. Gest, "Dr. Wu and the Natural Law," 27 *Pennsylvania Bar Association Quarterly* (1956) 338.

J. Leclercq, "Natural Law, the Unknown," 7 *Natural Law Forum* (1962) 1.

R. D. Lumb, "Natural Law, Thomism and Prof. Nielsen," 5 *Natural Law Forum* (1960) 112.

H. M. MacDonald, "Natural Law: A Basis for International Law Co-operation?" 10 *Loyola Law Review* (1960-61) 155.

C. F. Murphy, "Some Implications of Thomistic Jurisprudence," *Journal Tulane Law Review* (1962) 687.

K. Nielsen, "Examination of the Thomistic Theory of Natural Moral Law," 4 *Natural Law Forum* (1959) 44.

P. W. Palmer, "Natural Law and Pragmatism," 2 *Catholic Lawyer* (1956) 150.

P. J. Stanlis, "Dr. Wu and Justice Holmes: A Reappraisal on Natural Law," 18 *University of Detroit Law Journal* (1955) 249.

P. J. Stanlis, "Edmund Burke and the Natural Law," 33 *University of Detroit Law Journal* (1956) 150.

P. J. Stanlis, "Forward: Jurisprudence, A Symposium," 36 *University of Detroit Law Journal* (1958) 117.

⁶⁴ Anton-Hermann Chroust and Frederick A. Collins, Jr., "The Basic Ideas in the Philosophy of Law of St. Thomas Aquinas as Founded in the 'Summa Theologica'," 26 *Marquette Law Review* (1941-42) 13.

⁶⁵ *Ibid.*, p. 14, n. 8. *Summa Theologica*, I - II, q. 91, a. 2; a. 3; a. 4; q. 93, a. 6. As the authors point out, both these concepts, Divine Reason and the eternal law, were first developed by St. Augustine, as frequently acknowledged by St. Thomas in reference. According to Augustine, the eternal law is Divine Reason, the Will of God, ordering man to maintain the natural order. By thus introducing the concept of the eternal law into man's actions Augustine founded and defined the basic approach to the whole of natural law thought in the Middle Ages.

⁶⁶ *Ibid.*, p. 18, n. 31.

- ⁶⁷ *Ibid.*, p. 18.
- ⁶⁸ *Summa Theologica*, I-II, q. 94, a. 2. Cf. q. 91, a. 3; q. 94, a. 4.
- ⁶⁹ *Ibid.*, I-II, q. 94, a. 6. Cf. q. 91, a. 3. Note the following: "Now as 'being' is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently, the first principle in the practical reason is one founded on the notion of the 'good,' viz., that 'good' is that what all things seek after. Hence this is the first precept of law, that 'good' is to be done and pursued, and 'evil' is to be avoided. All other precepts of the natural law were based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done, or avoided," I-II, q. 94, a. 2.
- ⁷⁰ *Ibid.*, I-II, q. 94, a. 6. "The natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some cases it may fail . . . by reason of certain obstacles." *Ibid.*, q. 94, a. 4.
- ⁷¹ *Ibid.*, I-II, q. 91, a. 3; q. 92, a. 2; q. 94, a. 4.
- ⁷² *Ibid.*, q. 94, a. 4; a. 5.
- ⁷³ "Nothing hinders the natural law from being changed; since many things for the benefit of human life have been added over and above the natural law, both by the Divine Law, and by human law." *Ibid.*, q. 94, a. 5. Also see Chroust and Collins, *op. cit.*, p. 21, n. 57.
- ⁷⁴ *Ibid.*, q. 94, a. 5; cf. q. 93, a. 6; q. 94, a. 4.
- ⁷⁵ *Ibid.*, q. 93, a. 6; q. 94, a. 4; a. 5; a. 6.
- ⁷⁶ *Ibid.*, q. 95, a. 1.
- ⁷⁷ *Ibid.*, q. 91, a. 3; q. 94, a. 2; q. 95, a. 3; q. 92, a. 2.
- ⁷⁸ *Ibid.*, q. 93, a. 3; q. 95, a. 2.
- ⁷⁹ An unjust law not only does not bind the moral conscience, but it should be ignored by man, providing he avoid giving scandal by inflicting a more grievous hurt. *Ibid.*, q. 96, a. 4; II-II, q. 104, a. 5.
- ⁸⁰ *Ibid.*, I-II, q. 95, a. 2; cf. q. 95, a. 3. Chroust and Collins, *op. cit.*, pp. 21-22.
- ⁸¹ Although law must be virtuous, it is not empowered to prevent all evil or to achieve the good under all circumstances. Human law is for the "average person," he who must be led to virtue gradually. It is, thus, not for the already virtuous.
- ⁸² Without these conditions, a law is not a law. *Summa Theologica*, I-II, q. 92, a. 1; q. 95, a. 1. St. Thomas is fully aware that the general principles of natural law cannot be applied to all men in the same way for all times and in all places. Because of the great variety of human affairs, the human law must vary among different people." *Ibid.*, q. 95, a. 2.
- ⁸³ Chroust and Collins, *op. cit.*, p. 26.
- ⁸⁴ Thomas E. Davitt, "Law as Means to End — Thomas Aquinas," 14 *Vanderbilt Law Review* (1960) 65.
- ⁸⁵ *Summa Theologica*, I-II, q. 77., a. 1; II-II, q. 104, a. 5.
- ⁸⁶ My view has been formed basically by the work of Prof. Fuller. See his comments in "American Legal Philosophy at Mid-Century," 6 *Journal of*

Legal Education (1954) 471-3. Note especially p. 471, n. 26, in which he lists two books, neither written "from a Roman Catholic point of view," as evidence for a similar but independently arrived at point of view: John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (1953) and Leo Strauss, *Natural Right and History* (1953).

- 87 The basic difference in the methodologies of the natural and human sciences, as I see it, is that proposed by Wilhelm Dilthey when he characterized the type of knowledge that is the result of natural science as "explanation" and that of the human sciences as "understanding." See Dilthey, *Gesammelte Schriften*, VII, 328-9, for his meaning of "explanation"; and *ibid.*, V, 332, for "understanding."
- 88 "(But) I would like to say that Kelsen's insistence on the purely hypothetical character of the *Grundnorm* can deceive nobody. Inasmuch as that hypothesis has to be endorsed by a fact, Kelsen's refined form of positivism shows its real face, the reduction of law to a mere expression of force — and even this is an assertion of 'value'." Again: in commenting on a passage from Kelsen's *General Theory of Law and State*, p. 116, Prof. D'entreves observes that Kelsen himself recognizes that the ultimate validity of law lies beyond law itself — the natural law position. *Natural Law, An Introduction to Legal Philosophy*, (London: Hutchinson University Library, 1951), p. 108.
- 89 Although there is an indissoluble link between law and morals, there are differences between the two areas. An oft-repeated differential character is attributed to the Neo-Kantian school of legal philosophy, although anticipated by mediaeval philosophers (see *ibid.*, pp. 85-6): namely, that law is "social" or "objective" in *extension* as against morals being "individual" and "subjective." Another difference is that between the types of *sanction* attached to positive as against moral law. However, the most important of the differentials is said to be that between the "external" character of law and the "internal" character of morals in regard to *obligation*. This distinction, according to D'entreves, goes back at least to canon law (*ibid.*, pp. 87-88).
- 90 Fuller, *op. cit.*, p. 472.
- 91 Dilthey, G.S., VII, 320.
- 92 The search for unchanging ultimates in a changing world must be reconciled. Man, as a being in history, seeks guides which seem to be *ahistorical*. The solution of this apparent paradox will show that absolutism and relativism are both invalid as positions because both are valid as aspects of another more comprehensive view. The more naturalistic theories of law look upon positivism as relativistic and leading to the destruction of all morality. To the more positivistic legal theorist, naturalism is an absolutism that betrays a fear of reality as it is and a desire for an unchanging and thus a secure world created out of his speculations. Holmes once expressed this in his usually colorful manner. He wrote: "there is in all men a demand for the speculative, so much so that the poor devil who has no other way of reaching it obtains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law." Holmes, "Natural Law"; quoted by D'entreves, *Natural Law*, p. 96.
- 93 John Herman Randall, Jr., "Epilogue: The Nature of Naturalism," in Yervant H. Krikorian, ed., *Naturalism and the Human Spirit* (N.Y.: Columbia University, 1944), p. 354 ff.
- 94 *Ibid.*, p. 358. See *The Humanist Manifesto*, especially points # 8, 11, 13, 14, 15. This interesting document was first published in *The New Humanist* (First Series), forerunner of *The Humanist*, Vol. VI, no. 3, May-June, 1933.
- 95 One of the greatest obstacles to the acceptance of some sort of natural law theory by modern jurisprudes is the connection of such a theory with the

Judeo-Christian religious tradition. Those who are in that tradition can take the attitude of "take it or leave it" but this is not necessary. Metaphysical presuppositions can be "bracketed out" and ethical ends can be pursued in common if these same metaphysical ultimates are respected by each party. It is interesting to note that D'entreves sees the metaphysical presuppositions of natural law theories as the major obstacles in their acceptance. "For the agnostic of the present day, and perhaps indeed for the modern man who lives in a 'de-christianized world,' it will be very difficult to accept the notion of natural law, if that acceptance is made conditional on the acceptance of the metaphysical premise: *supposito quod mundus divina providentia regatur*. This, to my mind, is the first difficulty for the 'ontological' theory of natural law — a difficulty which may not be a difficulty at all if we simply take the line: 'Well, this is natural law. Take it or leave it.' But we are here to find, if possible, a way of making the argument for natural law acceptable also to people who do not share our own premises." A. P. D'entreves, "The Case For Natural Law Re-examined," 1 *Natural Law Forum* (1956) 37.

- ⁹⁶ Any "dialogue" between legal theorists, in order to reach greater understanding, will take the form of the following: Iredell Jenkins, "Matchmaker, or Toward a Synthesis of Legal Idealism and Positivism," 12 *Journal of Legal Education* (1959-60) 1-32, and John H. Crabb, "Positivism vs. Idealism: A Different Sort of Match," *ibid.*, 548-52.

A Discussion of: Jurisprudence Today: Naturalism vs. Positivism

RUTKOWSKI: In our private conversations after Professor Donoso's lecture this morning, Professor Strauss indicated that he liked very much Professor Donoso's listing, in a "rainbow fashion," the various schools of jurisprudence. I thought this was a very apt phrase to describe the kind of lucidity we saw in Dr. Donoso's paper.

Do you object, Professor Strauss, to my reporting your word, "rainbow?"

STRAUSS: I do not. Indeed, it is not my word. I just took it up from the street, not to say from the gutter. But it has a certain aptness of which I have become aware just now. It is the insensible shifting from one side to another which was largely illustrated by this morning's paper. Now if I may make another irrelevant remark before I come to my main point, I would like to say a word about the term, "orthodoxy," which is somehow used or implied when people speak of right and left. It can be understood in different ways. Either the orthodoxy is determined by intrinsic "rightness" — this is what Dr. Donoso did — or you can define orthodoxy by the majority vote, which could seem to be more democratic. From this point of view, the behavioralistic school would clearly be the orthodoxy of our day, and the natural law people the extreme left. The distinctions which you made were perfectly clear and entirely defensible on the basis of the evidence. But I would like to reformulate your statement. This does not bespeak any difference between Dr. Donoso and myself.

I would put at the left, the extreme left, what I would loosely call relativism. This includes legal positivism and other positivisms, as well as such a position as that of Lon Fuller; in a word, all those who do not admit any standards higher than positive standards. The

highest positive standard does not have to be the positive law; only very narrow-minded people assert that. If you admit as the highest standards, say, the principles of the Western tradition, or something like that, that is still a positive standard. It is surely preferable to ordinary legal positivism, but it is, I think, subject to the same charge — that it is a relativistic position. Because if you appeal to Western ideas as the highest principles, then you do nothing different from what a central African does who appeals to the ideas or values of his tribe.

Now then, if we turn to the right from here, I would say we come next to pragmatism. Pragmatism does have an ethics which it claims in effect is universally valid. But as universally valid it is formal; it defines the good in terms of a certain relation between custom and impulse; the content comes from the infinitely variable customs and impulses.

If we go one more step in the right direction, to the right, then we come to something we may call rationalism or idealism. According to this view, there are universally valid standards of some substance, but they do not have the character of natural ends; they have the character of ideals. They are ideas of reason. In other words, here is the true home of the distinction between the “is” and the “ought.” All those who speak of values in the sense of *the* values (the eternal values) or *the* ideals belong to this group.

Finally, the fourth group consists of those who deny the fundamental distinction between “is” and “ought” by speaking of the natural law proper. In other words, the people whom I loosely called rationalists or idealists do not admit of natural inclinations, whereas the concept of natural ends and natural inclinations is essential to the fourth group.

This is the way in which I see the rainbow discussed so competently by Dr. Donoso. I disregarded, of course, the more subtle differences within present-day American jurisprudence. But I think in substance we agree, do we not?

DONOSO: Yes.

RUTKOWSKI: I'd like to see if I can point up a question related to what has just been said. Professor Kirk has emphasized in his writings the notion of inherited legacy, of culture and tradition in a strong Burkean sense. I wonder, Professor Kirk, if you can link what you have been writing about to what Professor Strauss has just emphasized in Mr. Donoso's evaluation of positivism and jurisprudence.

KIRK: Yes, I do see a close connection there. I was especially interested in Mr. Donoso's account of legal idealism, with reference to Harold Lasswell, and a phrase that we encounter in Lasswell and all kinds of other people nowadays: human dignity and the protection

of human dignity. This has always puzzled me in connection with the legal idealists because it seems so empty in their context. It seems to have no more meaning than the meaning which is contained in Mark Twain's ironic phrase: "One man is as good as another, or perhaps a little bit better" — a vague humanitarianism without any content or reference. I think there is an understanding of human dignity in the traditional jurisprudence, and this is the model and source of human dignity which provides the law with its majesty. But if we break with the great traditions of jurisprudence and with its natural law sources, then the standard of human dignity, as in so much else, is left with only the empty phrase. This phrase, human dignity, is for the most part derived from Pico della Mirandola's celebrated oration on this topic. Mirandola was appealing to the great traditions of philosophy and jurisprudence. He derived human dignity from a source more than human. There is implicit in his argument the existence of transcendent norms and the assumption that human nature is a constant, and that human nature is dignified because it is something more than animal nature. In Mirandola's concept and elsewhere, one assumes that there are models for human nature. For the classical philosopher, Socrates was such a model of what a man should be. For the Christian, Christ is the model for humanity and an example of how human dignity operates. If one comes to the legal idealists, like Lasswell, one constantly finds the phrase, human dignity, used. But what actually are they after; what does it mean; what standard is there for it? How can one be dignified; how can any man be dignified if, in fact, he has only an animal nature? Why is not a dog dignified in the same sense? Presumably they appeal to rationalism, not to right reason, but to rationalism. Man is a rational creature; therefore, he is dignified. Of course, that doesn't really follow because there are plenty of shrewd, clever, quick people who nevertheless are lacking in human dignity. So it seems to me that here is one of the cardinal points of division in our time between the left in jurisprudence: the understanding of what human dignity amounts to, and what it is in law that courts and magistrates respect.

SCHUTZ: I would like to comment on this idea of left and right. Maybe I'm being pedantic, but knowing students I am afraid that if natural law is looked upon as being right wing, and in this case extreme right wing, it may capture some odd or negative allegiances. Natural law, it seems to me, is certainly a means of radical thought or radical criticism in our time. I hope I demonstrated that in my lecture. It can never be a means of radical politics, however. The natural law school cannot be revolutionary, for it has certain values concerning order and reason in contrast to disorder and violence. Thus gradualism is implicit in it. Dr. Strauss spoke to this point a moment ago: when the left is the orthodox position, natural law thinking may

paradoxically become a liberal way of thought. A little cartoon I saw recently illustrated this. Two students with YAF buttons were sitting on the stone steps of a campus building; one turned to the other and said: "Just think, someday we'll grow up and be stodgy old liberals."

STANLIS: I think that Professor Schutz has raised a very interesting question by implication, at least. That is, the whole connection between legal positivism and politics as such. I think there is a connection. I think that if we were to trace it out historically we would see some of the connections deriving from the rationalistic philosophy of the Enlightenment. But I think scientific positivism, positivism whether in law or in politics, cannot escape from the consequences of its own assumptions and methods. The theory inevitably leads, I think, to the conclusion that the government which holds power *de facto* is the source of law, and that law is nothing but the command of those who have power. Of course, Hobbes was the first philosopher in the English-speaking world to put forth that idea explicitly. But if the law of nature is eliminated, and if in effect law is conceived of simply as power directly applied through political machinery, then there is, ultimately, a complete severance between law and ethics, and I think in that case positivism denies that there is a moral law to which the power of the state is in any way subject. I think that when this happens there is only one basis for legal and political authority. That is power or might. And I think this moves swiftly in the direction of the totalitarianisms of our time. So I think that one of the strong points to note concerning legal positivism is that in its political manifestations it feeds directly into totalitarianism.

RUTKOWSKI: It struck me that we had an interesting paradox posed by Professor Donoso this morning. He first noted that natural law thinking was obviously connected to a notion of norm. This norm then served to underpin a constitution. A constitution, finally, was rooted in revolution, in a norm-setting period. This chain of reasoning would seem to interject something in the way of what Professor Schutz has said about radicalism and natural law. Professor Donoso, would you like to review for us that particular notion?

DONOSO: This is one of the points I wanted to bring up in the paper but did not; namely, the relation between jurisprudence and political philosophy, a relationship often called jurisprudential philosophy. Having a legal theory, do you thereby have a political theory? Or does adhering to a political theory imply a legal theory? In connection with Kelsen and his ultimate norm, based as it is on a revolutionary act, the implied political philosophy is said to be totalitarianism. The crucial issue here is what is meant by revolution. There are those who maintain that a revolution is valid, and by this they seem to mean "good," if it succeeds in taking power; be the result better or worse

than the previous conditions. If you say that the left wing of the schemata I drew would give you a sort of totalitarianism, you must remember that the left-wingers say that the right wing yields this type of political structure. Natural law theories become, according to many of these people, an excuse for the status quo, an excuse for maintaining exploitation and calling it natural. Exactly what is the connection between jurisprudence and political philosophy? I really can't answer that except to point out that each side calls the other the same thing: totalitarian. This should answer the initial question. Legal theories do imply political positions. And when one legal philosopher fails to realize this, his opponent is quick to remind him of it.

STRAUSS: It is perfectly true that the right and left distinction as other people or Mr. Donoso or myself use it is merely a colloquial convenience, and the political connotations are very complicated. One could as well say that Professor Donoso presented these various positions in an ascending order, and forget about right and left; then this difficulty would be disposed of easily. But one thing surprised me most in Mr. Donoso's paper. At the beginning, I was completely at a loss as to what he meant when he called Lasswell a legal idealist; but then I was reminded by what Mr. Kirk said, that one can in a pinch call him a legal idealist. I agree entirely with Mr. Kirk's final judgment that Lasswell's notion of human dignity has no solid basis. He opens one of his books with the unholy trinity of "safety, income, deference" as the only motivations of political men in general. How can he ever arrive at a notion of human dignity? To say nothing of the fact that what is good for the goose, called politician, is also naturally good for the gander, called scientist. Or is the scientist also motivated only by safety, income, deference? What will we have to think of Lasswell then? And if a professor can be guided by something more noble than safety, income, deference, it is perhaps possible for a politician also to be guided by something higher. But the more precise reason why I believe that Lasswell cannot arrive at a tenable conception of human dignity is this: You cannot speak of human dignity if you cannot speak of self-respect, and you cannot speak of self-respect if you do not admit the possibility of self-contempt. Now what possibility of self-contempt can exist on the basis of the absolute relativism of the urges which Lasswell is preaching all the time? Therefore, I would say that his idealism is only the respectable relic of a heritage which he enjoys; it does not belong to the theoretical position taken by him.

DONOSO: It is a relic in the sense that it is Yankee Protestantism become secularized.

STRAUSS: Yes, but the secularization is in fact the abolition of what has become secularized. As for the other point which was raised in the discussion: the necessarily revolutionary origin of the

basic norm; I do not know whether Kelsen ever said this explicitly, but this, of course, is not ultimately decisive. The fundamental alternative may be said to be the one between Hobbes and Aristotle. According to Hobbes, the state of nature is a state of anarchy out of which a revolutionary founding act creates order. Accordingly, as Hobbes says somewhere, the beginnings of no government can be justified in conscience — Burke himself repeats this somewhere. The alternative view would, I think, admit that in many cases this is so, but there is no necessity for that; that is the meaning, I think, of the statement at the beginning of Aristotle's *Politics*, that there is a way that the political community can come into being without any violence, without any crime, by nature, through the outgrowth of the family or the village, for instance. The denial of this *possibility* is, I believe, the decisive difference. In other words, one can be very skeptical as to the origins of governments, or organized political societies, in the majority of cases. But one must not go so far as to deny the intrinsic possibility of a just beginning of civil society. This, I believe, is the difference between Aristotle, say, and Machiavelli and all those who follow him.

PAUL: When you talk about questions like censorship, obscenity, pornography, abortion, artificial insemination, marriage, divorce, capital punishment, homosexuality, etc., you cannot talk about legal questions alone, and they certainly are not moral questions *per se*, because there happen to be laws on the books. Positive laws, not abstract laws or divine laws. Now, if you are going to talk about examination of these laws, which is what I am dealing with in my own specific category of sterilization, how do you examine these laws? Do you examine them as lawmakers, as theologians, as marriage counselors, or do you examine them as ordinary citizens, as parents, as sweethearts, or what? In other words, here is a case where you are not talking about the "is" and the "ought"; you are talking about *both*. In other words, the "is" is the law, but the "ought" — if you are talking about sterilization or abortion — the "ought" is the law, the societal law and the moral law. Now, you can't separate those two except analytically when you sit and gab. But the two, won't you agree, are inseparable?

DONOSO: Yes.

PAUL: The question is, how do you separate them? If you want to talk about what to *do* with the Michigan divorce law, or if you want to talk to someone who asks what we are going to *do* about the Michigan sterilization law, you are not talking about an "ought"; you are talking about a real, positive law and what ought to be done with it. You see, you are involved in both.

When you are dealing with concrete problems — particularly problems that deal with social morality, public morality — the mores, as well as the morals, of the society are part of it the "is." That is

to say, we are not talking about an "ought" abstractly. If you go over to the library and pick up the Michigan divorce law or the Michigan law of homicide, it won't look like much when you read it, but the "ought" is in that law, and the aspirations of Michigan, written into common law over the years, are part of that law insofar as homicide is concerned. So that actually we are talking about "ought" in a different sense from the "ought" that you were talking about in the natural law framework of your lecture. We are talking about "oughts"; that is, moral "oughts" — expectations that actually are part of positive law. Whether they are pure is another thing, but they are certainly part of it. And I think the difficulty is one you speak of: How do you take them out of the positive law to talk about them; how do you abstract them, particularly if you are talking about changing, repealing, improving, or extending the law?

SCHUTZ: I'd like to take a crack at Professor Donoso's calm. After he had gone through the entire paper and shown a wide spectrum of opinion, opinion that is basic and upsetting, I might add — especially in respect to the one I do know of, Lasswell — he came down to a final dichotomy: that the positions on the spectrum are essentially naturalism and supernaturalism. In the first place, I am not sure what he means by supernaturalism, but I would deny there is any necessity of labeling anyone there a supernaturalist. I would also deny that the positivists are the naturalists. I imagine that those were the ones Donoso was considering to be the naturalists, is that so?

DONOSO: To a degree.

SCHUTZ: Do you mean by nature, "natural science?" Or do you mean that man's nature is ever changing, constantly malleable; or that man can be made into anything because he's a lump of clay? Then, the positivists are the naturalists. But if you mean that man has a nature or an irreducible core of humanness, I do not see where the term has to be pre-empted by one side or the other. I myself deny that supernaturalism is necessary to any of the positions, though all of them rest upon certain metaphysical assumptions.

I find the last assertion in Donoso's lecture most disagreeable. He did not go into the political differences that result from the positions he delineated. However, I suppose you are aware of them. He said that somehow these people can agree upon something; namely fulfillment of man. In effect, he is repeating an old rhubarb of political science — let's have an agreement to disagree. Professor Strauss referred to this in his lecture. When there's an agreement to disagree, and everybody says there are ultimates we don't agree upon but we can agree on all secondary things, it means that the ultimates are not important to them. Other questions are more important, and they are in agreement on those, but that is something else. If the ultimates

are of basic importance, the agreement to disagree becomes some kind of wishy-washy liberalism. If these are the important questions of our time, and they do have important consequences for our behavior, it will be difficult to bypass them by some agreement to disagree. As to the fulfillment of man, it is said that they all can agree upon it. That sounds all right, but let's stop a minute. What is man? For if you apply this to each one, you're involved in the same thing all over again.

STRAUSS: I do not agree. But I have a similar difficulty as Mr. Schutz has. If a naturalist is a man who denies grace or is ignorant of grace, Aristotle was a naturalist. But in another sense it is false to call Aristotle simply a naturalist. To simplify matters, let me call Aristotle the highest representative of naturalism and Thomas Aquinas the highest representative of supernaturalism. Now, how could Aristotle and Aquinas live together as citizens of the same political community and have a very broad agreement with one another while still being in fundamental disagreement? I would say they could be fellow citizens. And why? Because there is the thing called "temporal felicity," regarding which the two men would entirely agree. They would disagree regarding the supernatural felicity, but this would not affect their working together for the temporal welfare of their community. Let us look at the present situation in this country. Catholics and non-Catholics live together as citizens on the basis not only of mere expediency, but of an agreement regarding principles which are the political and moral principles proper. I believe that was a justification for Professor Donoso's stopping at this point and saying that the ultimate disagreement regarding the supernatural cannot be settled, at least not by human beings; nevertheless, it is possible to have a solid basis of rational agreement between these two branches of human beings. Is this not so?

DONOSO: I didn't mean it in that sense; I purposely meant it to be used in a wide sense, so that each could read into the term what he wished. But, to be specific, it means that the end of man for supernaturalistic ethics is to be found in some sort of deity. This can refer to traditional theistic religions that are based upon the Bible or, if you wish, to some sort of modern or contemporary idealism with its cosmic mind. The distinction I introduced was primarily metaphysical, and secondarily, ethical and jurisprudential. Metaphysically speaking, naturalism refers to the position that all things are within a time-space continuum, so that the end of man has to do with the temporal. I recognize that within the naturalist position there are shades of differences. For example, there are those who are called gross materialists and tend to make man no different from a rock or a pig. Then, there are those who maintain there is something "unique" in man, albeit based on matter and having no foundation beyond space and time, as do the contemporary naturalists of the humanist movement.

My separation of the natural and the supernatural meant in no way to bring in grace; it meant in no way to exclude it either, or to put the Thomist or Catholic in one category, and the others in a different category. And when I said that I saw no grounds for bringing the supernaturalistic and naturalistic positions together, I meant that I am pessimistic in thinking that the Thomists, for example, who say that the basis of their philosophy can be shown by reason — I'm not saying that it can't — will ever convince the non-Thomists that this is so. Like it or not, we have with us metaphysical problems that deal with the nature of man. To make significant progress in human relations in the political, or jurispolitical, realm we must agree on ultimates concerning man. This we have been unable to do. We cannot threaten our neighbor's life: "Agree with me or else!" Should we then "agree to disagree" and leave the situation stand as such? If we do, does this mean that ultimates are unimportant? Whatever we do, we must recognize that ultimates are the most important issues confronting man. However, I believe we can make some progress in the jurispolitical area without degenerating — and I purposely use that word — into an attitude of "let's forget about ultimates; they're not important." Actually, we have been doing this. We have been living together even with our different answers to ultimate questions, because of our common concern for man's temporal felicity. Both the naturalist and the supernaturalist have one common interest — unless their words have been empty — namely, man's happiness. Both would agree that the world should be made a place in which man can fulfill himself. This is to make the world a better place in which to live. As each new issue arises, we must continue to try to solve the problem without permitting those who maintain man's temporal felicity to interfere with those who hold to man's need for eternal happiness, and vice versa.

STANLIS: I interpret that portion of Professor Donoso's paper which dealt with bridging the gap in terms of a kind of moral prudence, not so much in terms of metaphysical principles, about which men differ very strongly. But even granting that difference and recognizing it fully and putting a primacy on it, men can, I think, still get along in the realm of the practical, often with different motives, if they observe prudence and temperance by restraining their insistence at all points upon the truth as they see it. For example, it is perfectly conceivable that a supernaturalist and a naturalist, in the sense that Mr. Donoso uses the terms toward the end of his paper, might find some individual very seriously in need of the necessities of life. The motives of the supernaturalist might be the glory of God in helping such a person; the motives of the naturalist might simply be materialist. But they could both agree that the person in question needs economic assistance. They might also agree as to their means. They do not

have to insist at every point on their theological or metaphysical differences. And I think as a matter of moral prudence they can work in the practical realm toward agreed upon ends, even though there are many differences involved.

The Crisis of Political Philosophy

LEO STRAUSS

In my first lecture, I have tried to trace the crisis of our time to the crisis of political philosophy, and I suggested that a way out of the intellectual difficulties with which we are beset is a return to classical political philosophy and, in the first place, to Aristotle's *Politics*. In this lecture, I would like to discuss this return to Aristotle and the difficulties which seem to oppose it. Let me say only one more word about this crisis of political philosophy. I think it is no exaggeration to say that, generally speaking, political philosophy and even philosophy in general, has lost today its dignity and its status. Today, one can easily say that it is my philosophy to have two boiled eggs for my breakfast. What has happened to philosophy and, in particular, to political philosophy? The answer, I think, is clear.

There are two powers which are the recognized authorities in the Western world — in any Western country, especially in this country — which one can call positivism and historicism. Positivism is the view according to which only scientific knowledge, as defined by modern natural science, is genuine knowledge. This has the crucial implication that any assertions regarding values cannot be validated, but are mere subjective assertions. Historicism, on the other hand, is the view according to which the distinction between facts and values is ultimately not tenable because the highest principles of theoretical understanding, popularly called "categories," are inseparable from the highest principles of practice, popularly called "values," and that this "system," consisting of categories and values, is historically changeable: there is not *the* true system of categories and values. These are the two most powerful schools in the West today. Both are incompatible with political philosophy as an attempt to discover and to lay bare *the* true ends of man as man.

Positivism is in all respects, except one, inferior to historicism. Positivism, if it understands itself, will necessarily turn into historicism. For the basic premises of what is called science — that is to say, modern science — prove to be not evidently necessary; they are logically arbitrary, as they are admitted to be by the positivists themselves. This arbitrariness means, however, that they have been accepted in such a way that this was not merely an affair of this or that individual, but became a public factor that determined a whole period of history; it was a *historical* decision by virtue of which modern science became the power forming the modern world. Historicism, on the other hand, is more reflective than positivism because it raises a question which positivism cannot raise: *Why science?* It considers the human context out of which science stems, which positivism cannot genuinely do. Present-day positivism believes it can solve the problem simply by making a distinction between the validity of the findings of science and the genesis of science or of its findings. This distinction would make sense if science still could be understood as the perfection of the human intellect, the natural perfection of the human intellect; but no logical positivist can afford to say that. Therefore, he is forbidden to admit that the question, *Why science?*, must be raised, and he is surely unable to give an answer to that question. The relative merit which positivism has in this situation is that it asserts, in a very inadequate — not to say inept — manner, the notion of *the* one truth, or as it would probably prefer to call it, of objectivity. Political philosophy is an actuality in the West today only in Thomism. This creates a difficulty, however, even for the Thomists, because it gives rise to the suspicion that it is the Christian Catholic faith, and not human reason, which supports this political philosophy. Therefore, it is necessary even for the Thomists to show that the Aristotelian conception of political philosophy — Aristotle was not, after all, a Catholic Christian — has not been refuted by modern thought.

I have already indicated the specific grounds on which it is claimed that Aristotle's political philosophy has been refuted. The most common reason is that modern natural science, or modern cosmology, having refuted Aristotelian cosmology (e.g., by demonstrating "evolution"), has therewith refuted the principle or the basis of Aristotelian political philosophy. Aristotle took for granted the permanence of the species, and we "know" that the species are not permanent. But even granting that evolution is an established fact, that man has come into being out of another species, man is still essentially different from non-man. The fact of essential differences — the fact that there are "forms" — has in no way been refuted by evolutionism. The starting point of Aristotle, as well as of Plato, is that the whole consists of heterogeneous beings; that there is a noetic heterogeneity of beings, this common sensible notion on which we fall back all the time, and this has in no way been refuted. I remind you of the famous 17th

century criticism of formal causes, a criticism, which was properly presented in its most impressive form by a comic poet, Moliere, of the famous scholastic question, "Why does opium make men sleep?," and the answer, "*Quia est in eo virtus dormitiva, cujus est natura sensus assoupire*" (Because it has a dormitive power, a sleep-making power, the nature of which consists in putting the senses to sleep). This has been a famous joke repeated in this or that form innumerable often. It amounts to saying that reference to formal causes is in no way an explanation. But the joke is not so good as it appears at first hearing: if opium did not have sleep-making power, we would not be interested in it, if the ingredients of opium did not as such have this power; when you put together the elements out of which opium consists, then this whole has a character which the elements do not have, and this character is what makes opium opium. What is true of opium is true of man, as well as of any other being. It is, then, the notion of essence, of essential difference, which distinguishes the Aristotelian and the Platonic teaching from that of the characteristically modern philosophy, and especially modern science. If there are essential differences, there can be essential differences between the common good and the private good. However far the defeat of Aristotle's cosmology may extend, it does not go to the length of having destroyed the evidence of the concept of essential differences and, therefore, of essences.

The second argument, which is very common, is that Aristotle has been refuted because he was anti-democratic. I admit the fact, for I do not believe that the premises upon which some of our contemporaries seem to act — democracy is good and Aristotle is good — lead validly to the conclusion that Aristotle was a democrat. He was not a democrat. But on what grounds? Democracy meant at all times, in Greek times as well as today, the rule of all. But this is too abstract, because there is never unanimity, or hardly ever. In fact, in a democracy the majority rules. Yet, if there are stable majorities, then this stable majority will be in control in a democracy. What is that stable majority? Aristotle, in his great clarity and simplicity, said that in every *polis*, in every political society, there are two groups of people, the rich and the poor, and whatever may be the reason, the majority are the poor. Therefore, democracy is the rule of the poor. "Poor" does not mean "beggars." The poor are the people who have to earn their living, who cannot live as gentlemen. Because they are poor, they do not have the leisure for acquiring education, both sufficient theoretical and practical education, neither in maturity nor as children. They have no time for it; hence, they are uneducated. And no man in his senses would say that the political community should be ruled by the uneducated. This simple argument is in no way vicious as, I hope, you have seen. What is our argument against it?

Aristotle took something for granted which we can no longer take for granted. He took for granted that every economy would be an

economy of scarcity where the majority of men do not have leisure. We have discovered an economy of plenty and, in an economy of plenty, it is no longer true that the majority of people have to be uneducated. This is a perfectly legitimate reply to Aristotle as far as it goes. But we must see what precisely has changed. Not the principles of justice, they are the same. What has changed are the circumstances. On the very principle of justice, as Aristotle understood it, one would have to say that the argument regarding democracy as he stated it has to be modified because we have an economy of plenty. Yet this difference of circumstances is due to the modern economy, which in its turn is based on modern technology, which in its turn is based on modern science. Here we touch again on the fundamental difference between Aristotle and modern thought. A new interpretation of science, opposed to the Aristotelian interpretation, came to the fore in the 17th century in the works of Bacon, Descartes, and Hobbes. According to that new interpretation, science exists for the sake of human power and is not for the sake of understanding, as understanding, or of contemplation. As for this notion of science which is underlying the modern development, we have become doubtful whether it is as sound as it appeared for many generations. At the very latest, the explosion of the first atomic bomb made people doubtful whether the unlimited progress of science and technology is something unqualifiedly good. Not more than this is needed in order to see that Aristotle might have had a point when he denied that science is essentially in the service of the increase of human power.

Aristotle's non-democratic or anti-democratic view has apparently still another basis. This is his assumption, which he thought to be a fact, that men are by nature unequal in politically relevant respects. That they are unequal in regard to beauty would not be important, because we do not ordinarily elect officials on the ground of their being very handsome. But that there is a natural inequality regarding understanding, this is politically relevant. This kind of natural inequality can hardly be denied. The only serious attempt to deny it was made by the famous Russian biologist, Lysenko, with the assistance of Stalin, but I believe this attempt has been abandoned by Khrushchev, although I do not know it. This natural inequality is, of course, recognized by modern democracy, as is shown by our speaking of equality of opportunity, which implies that differently gifted people are supposed to do very different things with the opportunity offered. Differently stated, modern democracy is representative democracy, meaning a democracy which elects the people whom it believes are above the average. Modern democracy as representative democracy is opposed to direct democracy.

Another objection to Aristotle — and we come somewhat closer to the key issues — is that Aristotle's whole political philosophy is narrow, or provincial. After all, he was a Greek, and the subject

matter of his work is the Greek city-state, one particular form of human organization which was as important historically as any other, but which is just one among very many. This view is very common today, but it is not correct. Aristotle is not concerned with the Greek city-state. When you read the second book of the *Politics*, you see that he regarded a city like Carthage, which was a Phoenician city, as roughly equal to Sparta and definitely superior to Athens. The city-state is, then, not essentially Greek. This, however, is a minor difficulty. A more serious difficulty is this: When we speak of the city-state, we imply that there is such a thing called the "state," of which there are *n* various forms, one of them being the city-state. This thought cannot be translated into Greek; i.e., Aristotle's Greek. This concept of "state" is wholly alien to his thought. When we speak of "state" today, we ordinarily understand state in contradistinction to society. You will find it asserted in all textbooks that the Greek city — or let me now use the Greek word, "*polis*" — is not a state distinguished from a society. The *polis*, we may say, antedates the distinction of state and society. Aristotle does make a distinction between the *polis* and other associations or partnerships, but he does not bundle them all together under the title, "society," in contradistinction to the *polis*. His thought can be understood easily by every one of you if you only look at the right place for the modern equivalent of the concept of *polis*. That equivalent is our modern term, "the country." When you say the country is in danger, you do not make a distinction between the state and society. The country is the modern equivalent to what Aristotle understood by the city. Or look at another saying of somewhat questionable morality which still has a certain reasonableness, "my country right or wrong." You cannot possibly say, "my state right or wrong," or "my society right or wrong"; it does not sound right. "Country" is, then, truly the modern equivalent of "city." The difference is by no means unimportant. The difference indicates that the city is an urban association. The country, as the word indicates, is not necessarily urban, and this is surely due to the feudal past of modern nations. We are separated from Aristotle by a gulf which we must somehow bridge if we wish to understand him. Therefore, we must look for equivalents in our experience in order to understand, to get the experiential analogue to what Aristotle means when he speaks of the *polis*.

Let me now turn to Aristotle's own analysis of the *polis*. What is the character of the *polis*? What is the essential difference between the *polis* and all other associations? Aristotle answers: The end of the *polis* is happiness. All other associations serve a special purpose. The political society is the only association which is directed toward the complete human good, and that is called happiness. Happiness means the practice of moral virtue above everything else, the doing of noble deeds. Aristotle assumes something which is today absolutely

controversial, especially in scientific circles, but which he assumes is not controversial at all among reasonable people; namely, what happiness is. To develop this point fully, we would have to discuss the chapter of his *Rhetoric* where he speaks so clearly and beautifully about what happiness is. When reading that chapter, you will see that our ordinary notion of happiness is not different from the ordinary notion analyzed by Aristotle. What do we mean when calling a man happy? A man who has friends, who has good friends, who has many friends, who has children, and good children, who is healthy, reasonably wealthy, and so on. There is nothing particularly Greek about this. When we call a man happy, we mean, in the first place, that he is a contented man. But, we see from time to time people who are of a very low grade of understanding, perhaps moronic, who smile all the time. They are contented; yet no one would say that they are happy. We mean, then, by happiness a contentedness which is enviable, a reasonable contentedness. This is what all men understand by happiness, and, therefore, it is a good enough beginning for political philosophy, moral philosophy, to speak of happiness thus understood.

Yet, in modern times, surely from the 17th century onward, this beginning was questioned on a ground which, in present-day parlance, would be stated as follows:

Happiness is entirely subjective. What *A* understands by happiness differs from what *B* understands by happiness, and even what *A* understands by happiness is very different before he has had his dinner and after he has had his dinner. If happiness is entirely subjective, it can no longer be relevant for determining the common good. How then shall we find our bearing politically? The answer given by the founders of modern political philosophy was this: While happiness is radically subjective, the conditions of happiness are not. Whatever you may understand by happiness, in order to be happy you must be alive; secondly, you must be able to circulate; thirdly, you must be able to pursue happiness as you understand happiness, and perhaps even as you understand happiness at the moment. So life, liberty, pursuit of happiness are the conditions of happiness, however you understand happiness. They constitute the objective conditions of happiness. They possess that objectivity, that universality, which happiness lacks. Therefore, the function of political society is not to take care that the citizens are happy, that they become doers of noble deeds, as Aristotle called it, but to create the conditions of happiness, to protect them, or to use a technical term, to protect the natural rights of man; for the natural rights of man in the modern sense of the meaning are the conditions of happiness in the sense indicated. Under no circumstance may political society impose any notion of happiness upon the citizenry, for any notion of happiness would be subjective and therefore arbitrary. People will then pursue happiness; each one as he understands happiness. They all strive for happiness. This striving is partly cooperative,

but also partly competitive. This striving produces something like a web. This, I believe, is what is meant primarily by society, in contradistinction to the state.

If this analysis is in principle correct, we arrive at the following conclusion: The state is superior to society because its aim or end — the securing of the conditions of happiness, however happiness may be understood — is objective, i.e., the same for all. On the other hand, society is superior to the state because only as members of society, as distinguished from the state, are we concerned with the end, with happiness itself, and not with the conditions of happiness or the means of happiness. From this point of view, the public, the political, is in the service of the essentially private, of happiness, however one may understand happiness. But this fact that from one point of view the state is superior to society, from another point of view that society is superior to the state, creates a great theoretical difficulty. The solution favored by modern social thought consists in postulating another basis, distinguished from state and society, a kind of matrix for both state and society; this, I believe, is the function of the modern concept of culture or civilization as terms susceptible of being used in the plural.

I have referred to these conditions of happiness, and I have indicated that what they meant were the natural rights, the rights of man. I would like to say a word about this subject with regard to the discussion which we had this morning. This doctrine, which was developed in the 17th and 18th centuries, reminds us, of course, of the traditional natural law teaching, the Thomistic teaching. Outside of Catholic circles, it is rarely admitted, although it is so obvious, that there is a radical difference between the natural law teaching of the 17th and 18th century, and the medieval and classic ancient teaching. To illustrate the difference very briefly by a simple formula, the name which came into use in the 18th century for natural law was the rights of man, whereas the traditional name was natural law. First, "law" was replaced by "rights." When people spoke of law, they always meant the duties primarily, and the rights only derivatively. When Aristotle says that what the law does not command it forbids, he gives us a notion of what law originally meant. (I remember a modern interpreter who said that this is nonsense; the law never commands us to breathe; yet, no one can say that it forbids us to breathe. He did not make the simple reflection that by instituting military service, or perhaps by forbidding suicide, the law commands one to breathe.) Secondly, "nature" is replaced by "man." In the older notion, natural law is part of a larger order, of a hierarchic order indicated by the word, "nature." In the modern view, nature has been replaced by man. Man, taken entirely by himself, is, as it were, the origin of the rights belonging to him. The term, "rights of man," is the moral equivalent to that famous beginning of modern philosophy: Descartes's *ego cogitans*, the thinking ego. In Descartes's moral work, *The Passions*

of the *Soul*, the word, "duty," never occurs; but in the key passage the word, "right," occurs, which I believe is very characteristic.

Let me return to the general reflection about the *polis*. We are frequently misled today by a kind of learning which, if kept in its place, is highly valuable. I mean what the historians and philologists tell us about the Greeks; yet this is not sufficient for understanding what men like Aristotle and Plato meant. We must make a distinction between the pre-philosophic concept of the *polis* and the philosophic concept. I am concerned here only with the philosophic concept as developed by Aristotle especially. The philosophical concept of the *polis* is that the *polis* is the natural society, the society corresponding to the nature of man, society neither too small nor too large for man's reaching his perfection. Man's natural powers, especially his powers of knowing his fellow men and caring for them, are limited. Very roughly said, a *polis* is a society which is not too large for man, for the individual's power of knowing and actively caring. The *polis* is an association in which every man can know not every other — that would be a village — but an acquaintance of every other, so that he is in a position to find out for whom he votes; i.e., to whom he entrusts his life and fortune. The present discussions about metropolitan areas rediscover to some extent what Aristotle meant by the *polis* as the natural association.

But is it sufficient to say that Aristotle's political philosophy is concerned with the *polis*? You would only have to read the beginning of every book of the *Politics*, except the first, in order to see that it is not sufficient. The *polis* is only a provisional indication. The proper subject of the *Politics* is called in Greek, "*politeia*," a derivative from the word, *polis*. The ordinary English translation is "constitution," which is a somewhat misleading translation because, when we speak of a constitution, we do not mean something like the constitution of an animal; we mean something like the law of the land, the fundamental law of the land. Incidentally, the historical origin of our concept of the constitution is the fundamental law. The *politeia*, as Aristotle meant it, has nothing to do with law; it is distinguished from all laws. One can render its meaning by words like the "political order" or the "political order which originates the laws including the so-called constitutional law," or perhaps more simply as the "regime." Examples are democracy, oligarchy, tyranny, etc. These phenomena, to repeat, originate law rather than being constituted by law. We had a discussion today in connection with Kelsen's pure theory of law, of the basic norm, of that which is the origin of the whole legal order. According to Aristotle, that which originates the legal order is the political order, the regime. The character of the society is formed by the regime. Since there is a variety of regimes today, as well as at all times, the question inevitably arises: Which is the preferable regime? Or to state it with the proper simplicity, which is the best regime?

This is, one can say, the most important question for Aristotle. He surely is greatly concerned with discovering the order of rank of the various regimes. One cannot know the truth about any regime if one does not know how good or bad it is. E.g., you do not know anything, to speak of, about democracy if you do not know its virtues and defects. This simple fact points theoretically to the thought of the regime which has no defects, the best regime, and this is indeed the highest theme for Aristotle.

Let us return to the more practical level, to the variety of regimes. This is the subject of Aristotle; not the state, as the subject of political philosophy came to be called in the 19th century. The state as understood in these Victorian doctrines was something politically neutral, whereas the regime as Aristotle understands it is something politically divisive. It does not have to be divisive within a given society because all may be fully satisfied with the established regime. But it is in principle divisive because there will be other regimes elsewhere, and the claims of each of these regimes to be the best necessarily clash. Aristotle's political philosophy is political not only because of its subject matter, but because Aristotle is animated by the political passion, the concern for the best regime.

There is a certain difficulty here, a grave practical and moral problem, which Aristotle indicates in a way that seems to be quite academic. He says, citizen is relative to the regime; i.e., a citizen in a democracy is not necessarily a citizen in an oligarchy, etc. But if citizen is relative to the regime, then surely good citizen is also relative to the regime. Here we see the great difference between the good citizen and the good man. The good man is not relative to a regime, whereas the good citizen necessarily is. This creates some difficulties for many modern readers, although if we look around us we can easily recognize present-day parallels. For example, a good Communist cannot be a good citizen in a democracy, and vice versa. The relation of the regime to what is not the regime, to "society," corresponds to the general metaphysical distinction used by Aristotle between form and matter. Metaphysical means the same as common sensible here. The regime gives to the city its form. What, then, is the matter? All kinds of things, but the most important are the people, or more simply, the inhabitants of the city considered as not affected and molded by the regime. Not the citizens as citizens, for who is and who is not a citizen, is already determined by the regime. The form is higher in dignity than matter; for only the form is directly connected with the end. Therefore, the regime, and not the people on the sub-political level, are connected with the end of civil society.

Again speaking empirically, or common sensibly, every society is characterized by the fact that it looks up to something. Even the society which is wholly materialistic looks up to materialism. Every human being is what he is by the fact that he looks up to something.

Even if he does not look up to anything because he is a slave of his belly, for example, this is only a deficient mode of looking up to something. If we take a simple view of democracy, it looks up to equality, and this gives it its character. I have been told that the travelers of old China — a thousand years ago or more — when they came to a foreign country, to barbarians as they probably called them, they asked them first, "How do you greet or bow to your prince or king?" They were wiser than many present-day anthropologists, because their question was only a too special form of the question of what do you look up to. Every society, or civilization as they say today, has its unity due to the fact that there is a certain *order* to the things which they cherish, to their values, to what they esteem. There would not be a unity if there were not one, and only one, thing which is at the top. This gives a society its character. Aristotle adds that there must be a harmony between that to which a society looks up and the preponderant part of a society, the part of society which sets its tone; i.e., the regime. This, then, is the connection between the "end" and regime, the "form," the preponderant part, which may be the majority but need not be. There were societies in which a small part of the population was the preponderant or authoritative part. There is an essential connection between the *eidos*, the form, the character of a city, and the end to which the city is dedicated. This is an empirical proposition. Here we have come to the difficulty which even very good scholars sometimes fail to solve properly, and I would like to devote the rest of this lecture to this subject.

From his notion of the regime as *the* central and key political phenomenon, Aristotle apparently drew the conclusion that a change of regime transforms a given city into another city, and this seems to be abstruse. How can you say that Athens, when she became oligarchic, was no longer the same city as she was before that change? Aristotle's assertion seems to deny the obvious continuity of a city in spite of all changes of regime. Is it obviously not better to say that the same France which was first an absolute monarchy became thereafter a democracy, than to say that democratic France is a different country from monarchic France? Or generally stated, is it not better to say that the same substance of France takes on successively different forms, which, compared with the substance, are mere forms? Is this not the common sensible way of saying it, as shown by the way in which people write a history of the French constitution, or of the English constitution: the one thing, the same substance, the English constitution, undergoes these and those changes. It goes without saying that Aristotle was not blind to the continuity of the "matter," as distinguished from the discontinuity of the forms. He did not say that the sameness of a city depends exclusively on the sameness of the regime. For, in that case, there would not be, for instance, more than one democratic city. If the form alone establishes the identity, then

there can be only one democratic city. He said that the sameness of the city depends above all on the sameness of the regime, but not exclusively. Nevertheless, what he says runs counter to our notions. It does not run counter to our experience.

In order to see this, we must follow his presentation more closely than is usually done. Aristotle starts from an experience. Immediately after a city has become democratic, the democrats sometimes say of a certain act, such as a certain contractual obligation, debt, etc., that it is not an action of the city, but of the deposed oligarchs, or the deposed tyrant. The democrat, the partisan of democracy, implies that when there is no democracy there is no city which can act. It is, of course, no accident that Aristotle refers to a statement made by democrats as distinguished from oligarchs; Aristotle is always concrete. The oligarchs would not say that when there is a democracy there is no city. But they would say that the city has gone to pieces. This, however, leaves us wondering whether the city which is going to pieces can still be said simply to be. Let us say, then, that for the partisan of any regime, the city is only if it is informed by the regime which he favors. The moderate and sober people reject this extreme view and, therefore, say that the change of regime is a surface event which does not affect the being of the city at all. Those people will say that however relative the citizen may be to the regime, the good citizen is a man who serves his city well under any regime. We are very familiar with this, especially in countries where there have been changes of regime. Let us call these men the patriots, who say the fatherland is first, with the regime a strictly expediential and secondary consideration. The partisans will call the patriots turncoats, because if the regime changes the patriot changes his allegiance. Aristotle is neither a patriot in that simple sense, nor a partisan in that simple sense. He would disagree with both the partisans and the patriots. He says that a change of regime is much more radical than the patriots admit, but less radical than the partisans contend. Through a change of regime the city does not cease to be; the partisans go much too far. But the city becomes another city in a certain respect, in the most important respect. For with a change of regime, the political community becomes dedicated to an end radically different from its earlier end, and, therefore, it is the greatest and most fundamental change which a city can undergo. In making his apparently strange assertion, Aristotle thinks of the highest end to which a city can be dedicated; namely, human excellence. Is any change, he as it were asks us, which a city can undergo comparable in importance to its turning from nobility to baseness, or vice versa? We may say that his point of view is not that of the patriot, nor of the ordinary partisan, but that of the partisan of excellence. He does not say that through a change of regimes a city becomes another city in every respect. For instance, it will remain the same city with regard to obligations which the preceding

regime has undertaken. He fails to answer the question regarding treaty obligations not because he cannot answer it, as some people believe, but because it is not a political question strictly speaking, but rather, as he says, a legal question. Because he was a reasonable man, it is very easy to discern the principle which he would have followed in answering this legal question. If the deposed tyrant undertook obligations which are beneficial to the city, the city ought to honor these obligations. But if the tyrant undertook the obligations merely to feather his own nest or to pay for his bodyguard, then the city, of course, should not pay them.

In order to understand Aristotle's thesis regarding the supremacy of the regime, one has only to consider the phenomenon, which we all know, and of which we have heard so much, known by the name of loyalty. The loyalty demanded from every citizen is not mere loyalty to the bare country, to the country irrespective of the regime, but to the country *informed* by the regime, by the constitution. A fascist or Communist might claim that he undermines the Constitution of the United States out of loyalty to the United States. For, in his opinion, the Constitution is bad for the people of the United States. But his claim to be a loyal citizen will not be recognized. Someone might say that the Constitution could be changed constitutionally so that the regime would cease to be a liberal democracy and become either fascist or Communist, and that every citizen of the United States is then expected to be a loyal fascist or Communist. But no one loyal to liberal democracy, who knows what he is doing, would teach this doctrine, precisely because it is apt to undermine loyalty to liberal democracy. Only when a regime is in the state of complete decay can its transformation into another regime become publicly defensible.

We have come to distinguish between legality and legitimacy. Whatever is legal in a given society derives its ultimate legitimation from something which is the source of all law, ordinary or constitutional, from the legitimating principle — be it the sovereignty of the people, the divine right of kings, or whatever else. The legitimating principle is not simply justice, for there is a variety of principles of legitimacy. The legitimating principle is not natural law, for natural law is, as such, neutral as between democracy, aristocracy, and monarchy. The principle of legitimacy is in each case a specific notion of justice: justice democratically understood, justice oligarchically understood, justice aristocratically understood, etc. This is to say, every political society derives its character from a specific public or political morality, from what it regards as publicly defensible; and this means from what the preponderant part of society, not necessarily the majority, regards as just. A given society may be characterized by extreme permissiveness, but this very permissiveness is in need of being established and defended, and it necessarily has its limits. A permissive society which permits its members every sort of non-permissiveness will soon cease

to be permissive. It will vanish from the face of the earth. Not to see the city in the light of the variety of regimes means not to look at the city as a political man; that is to say, as a man concerned with a specific public morality. The variety of specific public moralities, or of regimes, necessarily gives rise to the question of the best regime, for every kind of regime claims to be the best and, therefore, forces one to face these claims, to meet them by wondering whether a given regime is best or not.

Let me conclude with a remark about a seeming self-contradiction of Aristotle regarding the highest theme of his *Politics*. He bases his thematic discussion of the best regime on the principle that the highest end of man, happiness, is the same for the individual and the city. As he makes clear, this principle would be accepted as such by everyone because it is a common sensible principle. The difficulty arises from the fact — and this arises more for Aristotle than for the ordinary citizen — that the highest end of the individual is contemplation, and not the doing of noble deeds. Aristotle seems to solve the difficulty by asserting that the city is as capable of the contemplative life as the individual. Yet it is obvious that the city is capable, at best, only of an analogue to the contemplative life. Aristotle reaches this apparent result only by an explicit abstraction appropriate to a political inquiry, strictly and narrowly conceived, from the full meaning of the best life of the individual. In such an inquiry, the trans-political life, the super-political, the life of the mind in contradistinction to the political life, comes to sight only as a limit of the political. Man is more than the citizen or the city. Man transcends the city, however, only by what is best in him. This is reflected in the fact that there are examples of men of the highest excellence, whereas Aristotle has no example of cities of the highest excellence, cities informed by the best regime. Man transcends the city only by pursuing true happiness, not by pursuing happiness, however happiness may be understood.
